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Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property

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LABOR, LUCK, AND LOVE: RECONSIDERING THE SANCTITY OF SEPARATE PROPERTY

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"Marriage is a proclamation that one need not battle alone the vicissitudes that life can bring, but can rely on a partner to share the burdens of living in what sometimes seems a capricious and indifferent universe."†

I. INTRODUCTION

Most jurisdictions' current family law systems embody the principle that marriage turns separate individuals into economic partners. If marriage ends, the fruits of both spouses' labor—the earnings accumulated by either spouse during marriage—are classified as marital property subject to division at divorce. Assets acquired before marriage and gifts or inheritances

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† MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 147 (1993).

received during marriage, on the other hand, generally belong to each spouse separately. The classification of these assets as sacrosanct separate property means that they are sheltered from division at divorce. Thus, labor-generated property presumptively belongs to spouses as a unit, while premarital and luck-generated (gifted or inherited) property belongs to spouses as separate individuals. Why the difference?

Earnings from labor are marital property because marriage is considered a joint venture to which each spouse contributes a combination of effort, sacrifice, and mutual support. Regardless of the relative market value of spouses' contributions, the law grants each spouse a right to the economic fruits of the marriage under the theory that spouses' monetary and nonmonetary contributions are of equal importance to the marriage. This arrangement also guarantees that homemakers are indirectly compensated for their nonwage labor without subjecting them to uncomfortable investigations into the market value of their contributions.

Unlike spouses' marital earnings, property acquired before marriage and gifts and inheritances received during marriage are regarded as external to the marital economic partnership. Property acquired before marriage cannot be said to be a product of spouses' joint venture because the labor expended to produce it preceded their union. Gifts and inheritances received during marriage, the theory goes, likewise cannot be said to be a product of the spouses' collective efforts. By definition, gifts and inheritances are not compensation for labor; they result from donors' altruistic impulses to give without expecting anything in return. Gifts and inheritances in particular are also kept separate from the joint marital pot out of respect for donors' intentions.

The notion that assets should be treated differently based on whether they came into the marriage through spouses' labor permeates most scholarly, statutory, and judicial discussions of marital property law. But with the exception of recent proposals by the American Law Institute (ALI) and by Carolyn Frantz and Hanoch Dagan, this labor-centered marital property rule has gone largely unquestioned. Indeed, some commentators take the labor-based classification paradigm as too self-evident to justify.[1] In reality, the theory and its application are riddled with inconsistencies.

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[1] *See* J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 FAM. L.Q. 219, 250 (1989) ("[T]he distinction between separate property and marital property . . . is perceived by most people as fair. There seems to be general acceptance today that spouses should share the fruits of the marital partnership, but not other property."); Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1237–38 ("All fifty states are . . . guided, at least to some degree, by a partnership theory of marriage when considering how to distribute property in the context of divorce, and most scholars and advocates have come to take the theory for granted. Indeed, most recent scholarship and policy proposals do not question the partnership theory, but instead focus on how both separate property and community property states can more faithfully implement the theory at divorce."); *see also* Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567 (1995); Alan Newman, *Incorporating the Partnership Theory of*

First, the labor-centered rule naively assumes that spouses with unequal separate holdings will be equally invested in the marriage as a joint venture. In many cases, spouses with widely divergent wealth have a disproportionate exposure to risk. As a result, they may not expend the same efforts toward income production—both before and during marriage. A law school graduate with a $10 million safety net is less likely to prioritize economic considerations in her choice of career path than one who enters the profession empty-handed or in debt. Where a born-rich dilettante marries a self-made professional, the labor-centered rule strictly applied produces perverse results—only the worker is forced to share.

Also, the line between acquisitions attributable to marital labor and those attributable to other factors—like premarital labor and sheer luck—is impossible to draw accurately. Many gifts and inheritances are not the result of pure altruism, but rather reflect, at least in part, a quid pro quo, an unarticulated exchange. On the flip side, earnings are rarely attributable solely to contemporaneous effort. Most often, earnings reflect a combination of past and current labor, as well as circumstances over which the individual worker has little control—circumstances that can often be traced to gifts, favors, or inherited privilege. An individual's education, cultural fluency, and professional contacts accessed through social and familial networks are just some of the lucky breaks that impact financial success.

Finally, the labor-centered partnership theory conflicts with widely held intuitions and typical practices in ongoing marriages. Property that would be considered separate as a legal matter is hardly ever kept wholly separate from the marriage. Rather, propertied spouses tend to share more and more of their individual assets as marriage progresses, mixing labor- and luck-generated property as their relationship grows and deepens.[2]

These problems may explain why in practice, deviations from the labor-centered rule abound. Various judicial trends and divorce doctrines—including transmutation by use,[3] commingling of separate and marital property,[4] and the treatment of income from and appreciation of separate prop-

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Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative, 49 EMORY L.J. 487 (2000).

[2] *See* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.12 cmt. a (2000) [hereinafter ALI PRINCIPLES] ("After many years of marriage, spouses typically do not think of their separate-property assets as separate, even if they would be so classified under the technical rules. Both spouses are likely to believe, for example, that such assets will be available to provide for their joint retirement, for a medical crisis of either spouse, or for the other personal emergencies. The longer the marriage the more likely it is that the spouses will have made decisions about their employment or the use of their marital assets that are premised in part on such expectations about the separate property of both spouses.").

[3] This doctrine recharacterizes separate property that has been used by both spouses—e.g., a family home—as marital property. *See infra* Part III.B.

[4] This doctrine treats accounts and property traceable to a combination of separate and marital funds as entirely marital property. *See infra* Part III.B.

erty[5]—effectively erode the labor-centered rule by assigning to the marriage property that, according to partnership theory, should belong to spouses separately.

Though these backdoor solutions address some inconsistencies in the current rule, they create other problems. For one, they are largely dependent on judicial discretion. As such they are unpredictable, they prolong and complicate settlement negotiations, and they raise the economic and emotional costs of divorce. Separate property is sacrosanct in theory, but in reality a given divorce could result in the division of marital earnings *and* other property to an alarmingly unpredictable extent.

Additionally, some of the doctrines overreach. For example, the transmutation of separate property that is shared during marriage penalizes propertied spouses for their generosity and produces a windfall for their mates. The rule thus puts propertied spouses in a bind. On the one hand, sharing their wealth exposes them to the risk that everything they own will be subject to division at divorce. On the other hand, keeping property separate when their hearts are ready to share may poison their chance at building a flourishing marriage based on love and trust.

Even before marriage, the current paradigm may damage relations. Because the economic implications of marriage are so uncertain, courting couples are left to their own devices in imagining a conceptual framework for dealing with unequal resources. Those who choose to write their own private marriage contracts swim in treacherous waters, as the process of reaching this agreement can become adversarial, with each party advised by lawyers dedicated to maximizing their individual clients' advantages.

The lack of clear legal and societal guidance on how much, if any, unearned and premarital wealth should be shared in marriage means that couples who cannot invent a sharing philosophy that strikes both parties as fair and safe have two options: live in conflict or split up. Those who do strike a balance must constantly renegotiate their sharing arrangement as circumstances change. This process forces them to repeatedly confront their power imbalance. "In cross-class marriages, one partner will usually have more money, more options, and, almost inevitably, more power in the relationship," explains one reporter of "marriages of unequals."[6] The law's silence on how much sharing is fair leaves laypeople to grapple on their own with a moral and philosophical challenge that often eludes judges and family law experts alike.[7]

[5] See *infra* Part III.B for a discussion concerning the varied treatments of appreciation of and income from separate property.

[6] Tamar Lewin, *A Marriage of Unequals*, N.Y. TIMES, May 19, 2005, at A1.

[7] As one affluent wife put it, "I . . . feel the awkwardness of helping [my son] buy a car, when I'm not helping [my husband's daughters] . . . . But I also have to be aware of overstepping." *Id.* The woman recalls wanting to help when these daughters' mother's house burned down. "I took out my checkbook," she said, "and I didn't know what was appropriate . . . . Emily Post doesn't deal with these situations." *Id.*

A different paradigm is clearly needed. The partnership theory's exclusive focus on labor is inconsistent with what most Americans presume marriage means[8] and with what civil marriage should mean in a society that values fairness and strives to create the best conditions for flourishing, loving relationships. Marriage is not fundamentally about equal contribution of labor. It is about two people joining the risks and rewards of their lives: merging their fates, committing to be "in the same boat," to sink or swim together, to contribute *un*equally at times if that's what it takes to keep the union afloat.

When a sick husband checks into the hospital and becomes fully supported by his wife or when a wife leaves her job to care for her ailing parent knowing she can rely on her husband's income, labor contributions to the "joint venture" are clearly unequal. If the hospitalized husband or the wife caring for her parent subsequently inherits a small fortune, they are likely to share it with their wage-earning spouse. Marriage fuses separate individuals into one unit in which efforts, consumption, goals, and decisionmaking are intertwined. The law should treat it accordingly.

This Article proposes a new alternative to the labor-centered marital property rule. Instead of focusing on how property was acquired, marital property law should look to spouses' overall financial resources and require them to share these resources *to the extent they shape their identities during the marriage.* Financial capability affects some of the most fundamental aspects of our lives—our health, our education, our work, the neighborhood in which we live. Marriages in which these aspects of spouses' identities are kept separate strike us as jarring. Imagine a husband and wife who sleep in the same bed, under the same roof, but who receive dramatically different levels of medical care.

I do not propose that *all* preexisting, gifted, and inherited property belong to the marriage. Rather, the approach introduced in this Article attributes a percentage of separate property to the marriage based on the length of the marriage and on the property owner's life expectancy. The core concept is to spread separate property over the life of the owner spouse and to allocate to the marriage a pro rata portion of this property.[9]

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[8] Lisa Mahle, *A Purse of Her Own: The Case Against Joint Bank Accounts*, 16 TEX. J. WOMEN & L. 45, 47–48 (2007) ("One of the most comprehensive studies of American couples found that a large majority of married Americans believe that married couples 'should pool all their property and financial assets.' The ideal of sharing is so strong that courts and academic commentators often simply assume that happy couples pool their resources." (citing PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 101 (1983))); Alicia Brokars Kelly, Money Matters in Marriage: Unmasking Interdependence in Spousal Economic Relations 3 (May 29, 2008) (unpublished manuscript, on file with author) ("[B]roadly sharing resources is an entrenched social norm and is also overwhelmingly what spouses actually do."). Note, however, that the extent to which this sharing ideal is followed in practice is debatable. *See* Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509, 1523–24 nn.47–51 (2006).

[9] A graphic illustration of the concept appears in Part IV.A.

For example, suppose a person marries at age thirty with $1 million in premarital property. Suppose also that actuarial tables project that this spouse will live to age eighty. The couple then gets divorced ten years into the marriage (one-fifth of the way through the owning spouse's fifty-year life expectancy). In that case $200,000 (one-fifth of $1 million) would be classified as marital property subject to division. This $200,000 represents a rough measure of what the $1 million means to the owner spouse for the duration of the marriage—a rough translation of the psychological cushion the property provides. Attributing this amount as well as all spousal earnings to the marriage means that for its duration, husband and wife experience the economic risks and dangers of life together. This approach ensures that workers and owners invest more comparably in the marriage than under the current rule, regardless of their inclinations, abilities, or motivations to generate income. At the same time, propertied spouses would be free to share their wealth without the fear that doing so would automatically convert it to marital property. Finally, spouses with disproportionate resources would be given an objective, rational, and fair conceptual foundation for charting a joint life plan, a foundation designed to ease the anxiety that financial imbalances can produce when a couple builds a home, plans for retirement, or contemplates raising children.

Part I introduces the labor-centered rule and explains its theoretical underpinning—the partnership theory of marriage. Part II critiques the prevailing paradigm. First, it argues that the current rule is theoretically inconsistent. Second, it shows that a wide range of caselaw and statutory provisions deviate from the principle. Finally, it reviews two recent proposals that challenge the labor-centered rule. Both proposals are promising but incomplete. Part III builds upon these proposals and offers an alternative to the current treatment of premarital and unearned property: A classification paradigm that ensures that spouses join risks and rewards by contributing comparably out of their overall financial capability, regardless of the property's source.

Before proceeding, a few provisos are warranted. First, this Article focuses exclusively on the classification of property at divorce because the legal manifestations of the labor-centered paradigm are most explicit in decisions regarding divorce property settlements. That said, the proposal's ramifications are important in shaping ongoing marriages. As Frantz and Dagan put it:

> [Because] the legal rules surrounding marital property . . . apply most often at the moment of divorce, commentators tend to focus more on their impact on divorced and divorcing couples than on ongoing marital relationships. But these rules are centrally *about* marriage, even marriages so successful they ultimately do not have to use them. Through marital property law, the state has the opportunity to help shape the social understanding of marriage, and thus the actions of those who partake in it. . . . [G]overnance rules operate during

marriage . . . to shape spouses' expectations and behavior with respect to marital property.[10]

Second, this Article is concerned with a backward-looking assessment of how much, if any, of what is traditionally defined as separate property should be subject to division as part of the property settlement at divorce. It is not concerned with postmarital earnings or with the needs of the spouses going forward. These issues are generally addressed through alimony or spousal support.[11] Although in many cases neither spouse owns any separate property and the earnings accumulated in the course of marriage are insufficient to provide for the nonearner or secondary earner going forward, much scholarship has already been devoted to the postdivorce needs of dependent spouses.[12] Almost none has challenged the separate property principle. This Article begins to fill in that gap.[13]

Third, this Article is not concerned with the question of whether fault should be a relevant factor in the division of marital property. For one, the issue has already received extensive scholarly attention.[14] More importantly, the marital property concept introduced below is equally relevant to

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[10] Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 76 (2004) (footnote omitted).

[11] On the distinction between property division and alimony as conceptual frameworks, see *id.* at 99–100 ("We use property division and alimony to signify different substantive considerations: Property division is backward-looking (looking at the marital relationship while it existed), while alimony reflects the law's concern with the postdivorce financial situation of the parties, their future needs, and their prospective abilities.").

[12] *See, e.g.*, L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 15–51 (1985); Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989); Marsha Garrison, *The Economic Consequences of Divorce: Would Adoption of the ALI Principles Improve Current Outcomes?*, 8 DUKE J. GENDER L. & POL'Y 119 (2001); Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L.J. 141 (2004); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103 (1989); Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513 (2005); Joan Williams, *Do Wives Own Half? Winning for Wives After* Wendt, 32 CONN. L. REV. 249 (1999) [hereinafter Williams, *Do Wives Own Half?*]; Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227 (1994).

[13] It should be noted however, that while this work does not address postdivorce earnings, the proposal advanced is not inconsistent with a more robust system of alimony. *See, e.g.*, Sally F. Goldfarb, *Marital Partnership and the Case for Permanent Alimony*, 27 J. FAM. L. 351 (1989); Singer, *supra* note 12. Nor is it inconsistent with a property division model that includes increases in earning capacity in marital property. *See* Frantz & Dagan, *supra* note 10, at 107–12.

[14] *See, e.g.*, Craig W. Dallon, *The Likely Impact of the ALI Principles of the Law of Family Dissolution on Property Division*, 2001 B.Y.U. L. REV. 891; Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1 (1987); Peter Nash Swisher, *The ALI Principles: A Farewell to Fault—But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse?*, 8 DUKE J. GENDER L. & POL'Y 213 (2001); Barbara Bennett Woodhouse & Katharine T. Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525 (1994).

fault-based and no-fault regimes. The choice between the two is therefore extraneous to this investigation.

Fourth, at first glance, this Article may appear inapplicable to the minority of states that subject *all* property to division at divorce—so-called "hotchpot," "kitchen sink," or "all property" states.[15] But while these states do not distinguish between marital and separate property at the outset of divorce proceedings, at the distribution stage they too tend toward the same labor-centered paradigm, usually awarding most or all preexisting, gifted, and inherited property to the owner spouse.[16]

A similar analysis explains the relevance of this discussion to non-community property states. For much of this country's history, only community property states classified the fruits of spouses' labor as marital and preserved other property as separate.[17] But non-community property jurisdictions have now adopted an essentially identical paradigm through equitable distribution regimes[18] that come into play at divorce.[19] The proposal is thus applicable nationwide.

Finally, this Article does not aim to dismiss reforms that have made divorce more equitable over the last three decades. On the contrary, the partnership model and the equitable distribution revolution it inspired laid the groundwork for this project. Equitable distribution represents a marked improvement compared to the dominant title theory of marriage that preceded

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[15] *See* J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 3.03[2] (2007).

[16] *See* FAMILY LAW AND PRACTICE § 37.06 (Arnold H. Rutkin ed., 2006) ("In some states, property acquired by gift or inheritance is subject to equitable distribution. In such states, statutes may permit a court to consider the source of such property as a factor in making an equitable distribution. Moreover, judicial decisions in these states may afford a degree of protection for property acquired by gift or inheritance, even if the statute provides that such property is subject to equitable distribution."); Gary, *supra* note 1, at 574 ("In seventeen states, all property owned by either spouse is subject to division. Courts in these states can still consider the origin of the property in order to determine distribution."); Oldham, *supra* note 1, at 220 ("[E]ven kitchen sink states seem increasingly inclined to award 'separate' property to the owning spouse."). For a historical note on the increasing trend toward a dual- rather than all-property regime, see Mary Moers Wenig, *The Marital Property Law of Connecticut: Past, Present and Future*, 1990 WIS. L. REV. 807, 827–28.

[17] This "community system of acquests" originated in the seventh century in Visigothic Spain. *See* WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 3 (2d ed. 1971).

[18] For this reason, this Article will refer to "marital property" as synonymous with "community property." *See* Goldfarb, *supra* note 13, at 354 ("All common law states now permit equitable distribution of property at divorce, thereby recognizing that both spouses have been partners in acquiring property during the marriage regardless of which spouse holds title."); *see also* OLDHAM, *supra* note 15, § 5.03[1]; John DeWitt Gregory, *The ALI Property Division Principles: A Model of Radical Paternalism*, *in* RECONCEIVING THE FAMILY 163, 166 n.21 (Robin Fretwell Wilson ed., 2006).

[19] During marriage, community and non-community property states remain distinct. In community property states, each spouse has a one-half interest in earnings upon their receipt. *See* DE FUNIAK & VAUGHN, *supra* note 17, § 66. In the other states, spouses hold individual title to their earnings unless and until divorce proceedings commence, at which point the earnings are classified as marital. *Id.*

it.[20] The shift from title theory to equitable distribution turned many non- and low-earning spouses from dependents with almost no property rights at divorce into full-fledged partners in a joint enterprise—if not in practice, then at least in theory. This Article contends that the revolution was incomplete: marital property should include labor-generated property *as well as* the portion of luck-generated and premarital property allocable to the marriage. Partnership-based equitable distribution may be preferable to title theory, but it did not go far enough. This Article takes the next step.

II. TRADITIONAL JUSTIFICATION FOR THE CURRENT SYSTEM: THE PARTNERSHIP THEORY OF MARRIAGE

A. The Marital Property Rule

The most prevalent justification for the rule classifying spouses' earnings as marital is known variously as the partnership theory of marriage,[21] the contribution theory,[22] the joint property theory,[23] or the marital-sharing theory.[24] Partnership theory, as it is most widely used, refers to the principle that both spouses should be entitled to earnings acquired by either spouse because both spouses' direct and indirect contributions generated this income. It should be noted that although the "partnership theory of marriage" frequently refers to the marital property regime centered on contribution of labor that is the focus of this Article, this is not always the

[20] Under the title theory of marriage, which guided divorce proceedings in non-community property states until the 1970s, earnings remained titled in the name of their nominal earner—usually the husband. If the wife had not caused the divorce, she was generally granted relief in the form of alimony—a support award designed to enable her to maintain the lifestyle to which she was accustomed. Alimony was based on projected needs rather than retroactive entitlement; it was not tied to the amount of property acquired during the marriage, and it was not conceived as compensation for the wife's efforts to assist in the husband's income production. *See* OLDHAM, *supra* note 15, § 3.02[1]. But contrary to popular perceptions, alimony was often quite limited. *See* Goldfarb, *supra* note 13, at 366–67.

[21] *See* ALI PRINCIPLES, *supra* note 2, § 4.04 ("[U]se of the term ['partnership'] is metaphorical and the analogy imperfect. It has become a common way, however, by which to describe the central principle that marriage involves the commitment of both spouses' labors, during their marriage, to the family."). On the partnership theory of marriage generally, see Helene S. Shapo, *"A Tale of Two Systems": Anglo-American Problems in the Modernization of Inheritance Legislation*, 60 TENN. L. REV. 707, 722 (1993); Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 44 (1994).

[22] *See, e.g.*, Frantz & Dagan, *supra* note 10, at 89 ("Some scholars have argued that a liberal marriage must . . . include a commitment to giving each spouse what are singularly the fruits of his or her contribution.").

[23] *See, e.g.*, Joan Williams, *Do Wives Own Half?*, *supra* note 12, at 265 ("If an asset is produced by two family members, it makes no sense to award ownership to only one of them.").

[24] *See, e.g.*, Waggoner, *supra* note 21, at 43 ("Under [the marital-sharing theory], the economic rights of each spouse are seen as deriving from an unspoken or imputed marital bargain under which the partners agree that each is to enjoy a half interest in the economic production of the marriage . . . .").

case.[25] Still, because partnership has come to be used as shorthand for this contribution-of-labor idea, this Article will follow this convention. The theory comes in two forms: a descriptive, contract-based form and a restitutionary, normative form.[26]

The contract-based version of the partnership theory applies a retroactive assumption that if the parties had explicitly delineated the terms of their union at the outset, they would have agreed that the fruits of both spouses' labor would accrue to the marriage as a unit. According to this "hypothetical bargain" notion,[27] marriage implies an agreement to pool earnings.[28] Property earned in the course of marriage should thus be classified as marital to match the parties' expectations and reliance interests.[29]

The normative version of the partnership theory imposes a shared-earnings rule on the parties regardless of whether they would have agreed to it based on a moral, restitutionary "return-of-contribution" notion.[30] This approach recognizes that spouses who earn less generally have less bargaining power, but insists that they be treated as equally deserving members of

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[25] *See, e.g.*, Shapo, *supra* note 21, at 722 ("[T]he partnership relationship of an ongoing marriage is more accurately described as 'a sharing of goods from each according to ability, to each according to need.'").

[26] *See* Shahar Lifshitz, *On Past Assets and Future Assets, and on the Philosophy of Mutual Spousal Assets in Israeli Law*, 34 MISHPATIM 627, 647–57 (2004) (Isr.).

[27] Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687, 723.

[28] *See id.* at 725 ("It is plausible to posit that modern married couples typically understand ownership of assets during marriage to be shared property."); *see also* Elizabeth S. Scott & Robert E. Scott, *Marriage as Relation Contract*, 84 VA. L. REV. 1225, 1308 (1998) (predicting that most couples would choose common ownership ex ante); Waggoner, *supra* note 21, at 43 ("Sometimes [the partnership theory] is portrayed 'as an expression of the presumed intent of husbands and wives to pool their fortunes on an equal basis, share and share alike.' Under this approach, the economic rights of each spouse are seen as deriving from an unspoken or imputed marital bargain under which the partners agree that each is to enjoy a half interest in the economic production of the marriage, that is, in the property nominally acquired by and titled in the sole name of either partner during the marriage (other than in property acquired by gift or inheritance)." (quoting MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 131 (1989))). *But see* Lifshitz, *supra* note 26, at 727 (suggesting that the attempt to devise "neutral" rules mirroring society's attitudes is futile because spouses' expectations are influenced by the existing legal system and that reformers should thus draft laws that both reflect existing mores and take responsibility for shaping new ones).

[29] *See* Scott, *supra* note 27, at 723–25 ("It seems improbable that most couples engaged in premarriage bargaining would agree to a quick and easy exit from marriage and minimal postdivorce familial obligation."); Scott & Scott, *supra* note 28, at 1308 (asserting that equal distribution of property acquired during the marriage follows the approach that most couples would choose ex ante); Waggoner, *supra* note 21, at 43 (noting that the partnership theory of marriage follows the assumption that spouses intend to pool their resources equally).

[30] *See* Lifshitz, *supra* note 26, at 650–657; Waggoner, *supra* note 21, at 43 ("Sometimes the theory is visualized in restitutionary terms, a return-of-contribution notion."). Elizabeth Scott has argued in particular that marriage most resembles a "relational contract." "In the commercial setting," she explains, "a relational contract is one that extends indefinitely over time, and that may serve multiple varied purposes, creating a complex interdependent relationship." Scott, *supra* note 27, at 723.

the marital partnership based on fairness.[31] Non- or low-wage-earning spouses often contribute substantially to their partners' earnings—both directly, by serving as informal consultants and advisors, and indirectly, by managing the household and raising children. A rule designating earnings as marital ensures that this labor is compensated.[32]

Once divorcing spouses' marital earnings are determined, two approaches generally govern the eventual distribution of this marital property. One divides the property based on a case-by-case calculus of the parties' relative contributions and needs; the other requires an equal division of all marital property without further inquiry.[33]

Dividing marital property based on a case-by-case determination of relative contribution is the most theoretically consistent practical manifestation of the partnership principle, and some equitable distribution schemes require judges dividing marital property between the spouses to take both monetary and nonmonetary contributions into account.[34] But many equitable distribution schemes take spouses' postdivorce needs into account as well, a factor that frequently conflicts with the contribution factor.[35] In any

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[31] In most cases this more economically vulnerable spouse is the wife; thus, the normative form of the insistence that all earnings be classified as marital was initially endorsed by many feminists. This same approach, however, has also been criticized as detrimental to women. *See* Rosenbury, *supra* note 1, at 1233 ("[T]he partnership theory of marriage, while seemingly more egalitarian, may also reinforce wifely sacrifice by rewarding women for caring for their husbands and children at the possible expense of their own tangible property acquisition or other forms of individual fulfillment. The partnership theory thereby reinforces traditional gender role expectations allocating wage work to men and care work to women . . . . [T]he partnership theory contributes to the perception that the allocation of wage work to men and care work to women is a natural division of labor as opposed to a societal construct.").

[32] *See infra* notes 34–36 and accompanying text.

[33] Scholars disagree over whether and to what extent the equal division model prevails in practice. *Compare* ALI PRINCIPLES, *supra* note 2, § 4.09 cmt. a, reporter's notes cmt. b, Frantz & Dagan, *supra* note 10, at 100–02 ("[Equal division is t]he cornerstone of contemporary law of marital property . . . ."), Garrison, *supra* note 12, at 124 ("[O]nly a handful of states have equal statutory provisions establishing equal division as a presumptive outcome[, but] a larger number have judicial precedents that establish such a presumption or posit equal division as an analytical starting point."), *and* Williams, *Do Wives Own Half?*, *supra* note 12, at 266–67 ("We should . . . give the wife half the accumulated family wealth based on her family work, without which that wealth could not have been created." (emphasis omitted)), *with* Papuchis v. Papuchis, 341 S.E.2d 829, 830 (Va. Ct. App. 1986) (declining to adopt a rebuttable presumption favoring equal division), *and* Rosenbury, *supra* note 1, at 1237 ("[B]ecause the standards guiding the distribution [of marital property] can often be vague, courts have much room to determine that an unequal division is nonetheless equitable.").

[34] ALI PRINCIPLES, *supra* note 2, § 4.09 reporter's notes cmt. c; Gary, *supra* note 1. For scholarly arguments in favor of including relative contribution as a factor in equitable distribution decisions, see Sanford N. Katz, *Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251, 1272 (1998).

[35] *See* ALI PRINCIPLES, *supra* note 2, § 4.09 cmt. a ("[S]tatutes typically provide the judge no guidance in weighing the relative importance of the various factors. Although these lists often include eight or 10 factors, most of the factors are specific examples of two basic but conflicting principles: property should be allocated in proportion to the spousal contributions to its acquisition, and property should be allocated according to relative spousal need. These principles conflict because the relative contribution of the spouses to the acquisition of marital property is usually inversely related to their relative financial need at divorce.").

case, ad hoc valuations of spouses' relative contributions and needs are burdensome and intrusive, and often mirror society's tendency to undervalue nonmarket labor.[36] They also leave too much uncertainty as to the likely outcome of any given divorce.[37] Finally, the case-by case approach requires assigning an objective value to the nonmarket contributions of the non- or low-earning spouse, something that many believe is undesirable and perhaps impossible.[38]

Rather than leaving the division of marital property entirely in the hands of judicial discretion, many jurisdictions and commentators support an equal division rule or presumption.[39] One version of this model assumes that a non-wage-earning spouse has indirectly earned half of the wage earner's accumulated income. Thus, for example, because married men earn more than unmarried men, wives—the argument goes—are responsible for the additional income earned by virtue of their husbands' marital status.[40] Adding this excess to the imputed income from wives' household

[36] *See* Singer, *supra* note 12, at 1119 ("[D]ivorce doctrines that allow for substantial judicial discretion generally operate to women's disadvantage . . . . The absence of clear-cut legal standards also affects the negotiation process in ways that disadvantage the economically weaker party, generally the woman, in divorce. Finally, the lack of precise standards . . . may drive up the costs associated with divorce, particularly attorneys' fees, which again penalizes the economically weaker spouse.").

[37] For a discussion on the drawbacks of broad judicial discretion over divorce, see ALI PRINCIPLES, *supra* note 2, § 4.09 cmt. a ("[T]he decisional variability often found today in equitable-distribution systems arises at least in part because trial courts apply different principles as often as they face different facts. Yet the resulting variability in the principles by which cases are decided is of course unjust."); Oldham, *supra* note 1, at 249–50 ("What is wrong with total judicial discretion in divorce decisions? Indeed, this might permit a court to make additional provisions for a dependent spouse. Still, when no limits are placed upon the divorce court's discretion, results in each state have been arbitrary.").

[38] *See* ALI PRINCIPLES, *supra* note 2, § 4.09 cmt. c. For arguments against commodification of household labor, see Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81, 84–85, 116–17 (1997); *cf.* Barbara Freedman Wand & Ilana Hurwitz, *The "Genius Factor" and Equitable Distribution of Property at Divorce*, BOSTON B.J., Jan.–Feb. 1994, at 10, 26–27 (commenting on *deCastro v. deCastro*, 616 N.E.2d 52, 56 (Mass. 1993), in which the husband essentially argued that courts should consider a new factor, the "genius factor," when fashioning an equitable distribution of property, and noting that "[i]f courts recognize a 'genius' factor and a 'super-contribution' theory as appropriate considerations in equitable distribution of property, one must also consider the possibility of the recognition of a 'dunce' factor or 'inferior-contribution' theory, where one spouse could claim that an employed spouse performed less proficiently than the ordinary spouse in his profession, thus justifying a lesser portion of the marital assets to that spouse").

[39] Though early forms of the community property model—the progenitor of the labor-luck principle—employed a contribution-based division of community property, the dominant form of the model contemplated equal division at divorce. DE FUNIAK & VAUGHN, *supra* note 17, at 142–43 ("In many early forms of [community property], the acquisitions, earnings and gains during the marriage were not shared equally between the spouses but rather in proportion to the amount of property each had brought or contributed to the marriage . . . . But by the time of the thirteenth century we find the Spanish law providing that the spouses should share in these things equally, that is by the halves, irrespective of whether one spouse was richer than the other, and this continued thereafter unchanged."); *see also id.* at 2–3; Gary, *supra* note 1, at 572.

[40] Note, however, that debate persists over whether the correlation between marital status and earnings results from a causal relationship between the two. *See* ALI PRINCIPLES, *supra* note 2, § 4.09 re-

and childrearing labor—the money saved by not contracting out for these services[41]—might well entitle women to fifty percent of earnings. Wage-earning women generally earn less than their husbands, but they make up the difference (some more than make up the difference) by shouldering most of the couple's domestic duties.[42] But most commentators view such attempts at valuation as spurious. The more common justification for equal division focuses "on spouses' contribution to the entire marital relationship, not just to the accumulation of financial assets."[43] Alternatively, rather than presuming to reflect an accurate gauge of relative contribution, equal division embodies a general ideological and aspirational commitment to equal-

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porter's notes cmt. c ("Married men . . . earn more than unmarried men, which some observers take as evidence of [the premise that one spouse's homemaker services add to the other spouse's earning capacity]."); Hal R. Varian, *Analyzing the Marriage Gap*, N.Y. TIMES, July 29, 2004, at C2 (pegging the "marriage wage premium" at between ten and fifty percent and reporting on a study by economists Kate Antonovics and Robert Town, which concluded that marriage has a causal impact on wages). Other observers suggest instead the converse explanation for married men's greater earnings: men with financial promise are more likely to marry because they are more successful as suitors. One analysis of the data concludes, however, that neither explanation for married men's earning advantage is correct but that instead, some third variable affects both male earnings and male marital prospects. Yinon Cohen & Yitchak Haberfeld, *Why Do Married Men Earn More than Unmarried Men?*, 20 SOC. SCI. RES. 29 (1991); *see also* Christopher Cornwell & Peter Rupert, *Unobservable Individual Effects, Marriage and the Earnings of Young Men*, 35 ECON. INQUIRY 285, 285 (1997) (supporting Cohen and Haberfield in finding that most of the male earnings premium attributed to marriage "is associated with unobservable individual effects that are correlated with marital status and wages"). *But see* Sanders Korenman & David Neumark, *Does Marriage Really Make Men More Productive?*, 26 J. HUM. RESOURCES 282 (1991) (finding that the effect of marriage on earnings takes place over time, and suggesting that it results from marriage itself). There are a host of possible factors that could affect both marriageability and earning potential, thus confounding the analysis—for example, social skills, intelligence, and attractive personal appearance could all have a positive effect on both male earnings and male marriageability.

41 For an estimate of the market value of nonearner married mothers, see *Stay-at-Home Mother's Work Worth $138,095 a Year*, REUTERS, May 2, 2007, http://www.reuters.com/article/domesticNews/idUSN0236053520070502?src=050207_1719_ARTICLE_PROMO_also_on_reuters [hereinafter *Stay-at-Home Mother's Work*] ("If the typical stay-at-home mother in the United States were paid for her work . . . she would earn $138,095 a year . . . . The 10 jobs listed as comprising a mother's work were housekeeper, cook, day care center teacher, laundry machine operator, van driver, facilities manager, janitor, computer operator, chief executive officer and psychologist.").

42 *See* Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 520 n.18 (1998) (describing studies showing that women in dual-earner couples do more domestic work); *Stay-at-Home Mother's Work*, *supra* note 41 ("A mother who holds full-time job [sic] outside the home would earn an additional $85,939 for the work she does at home."); *see also* Silbaugh, *supra* note 38, at 118–19 (discussing divorce courts' failures to account for home work by women in dual-earner households).

43 ALI PRINCIPLES, *supra* note 2, § 4.09 cmt. c. ("The spousal contribution of domestic labor may not confer an equal financial benefit, but may have made it possible for the couple to raise children as well as accumulate property. One spouse may have contributed more than the other in emotional stability, optimism, or social skills, and thereby enriched the marital life. Property may be the only thing left at dissolution for the court to divide, but it is not usually the only thing produced during the marriage. An equal allocation of the property at divorce might thus be grounded on a presumption that both spouses contributed significantly to the entire relationship whether or not they contributed equally to accumulation of property during it.").

ity in marriage.[44] Thus, while the fifty-fifty rule may overcompensate or undercompensate spouses in different scenarios,[45] faced with the difficulties in measuring true contribution, equal division functions as an appealing default,[46] reflecting and reinforcing the ideal of equality in marriage.[47]

Disagreements regarding *how* contributions should be measured notwithstanding, the partnership theory, broadly conceived, treats marital earnings as subject to division in order to ensure that both spouses are compensated for their labor. Breadwinners and homemakers are thus entitled to a portion of marital property because they have earned it.

B. The Separate Property Rule

Because property acquired prior to marriage and gifts and bequests received during marriage do not result from the fruits of spouses' labor during the marriage, partnership theory classifies them as external to the marriage. Preexisting property cannot possibly be conceived as a product of the joint marital endeavor and therefore assigning any part of it to the marriage would bestow a windfall on a nonowner spouse who contributed nothing to its acquisition. Gifts and bequests given to one of the spouses are by definition gratuitous rather than compensatory and do not therefore belong to the marriage as joint venture, but rather to the donee spouse individually.[48] Gifts and bequests are also separate out of respect for donors' intentions,[49]

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44 *See* Martha Albertson Fineman, *Our Sacred Institution: The Ideal of the Family in American Law and Society*, 1993 UTAH L. REV. 387, 396–97 (noting that the use of the partnership business metaphor has led to a more egalitarian reconstruction of marriage and family); Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 109–10 (1998) (arguing that monetary and nonmonetary contributions to marriage should be treated equally because wages and housework "are both expressions of affection as well as materially beneficial"); Singer, *supra* note 12, at 1114 (finding the investment partnership theory of marriage promising for achieving more equal and equitable results for women because it entitles women to an equal share of the fruits of the marriage).

45 Some commentators have complained that equal division has not translated into equal results, leaving women and their children with less than they deserve. *See* Singer, *supra* note 12, at 1113–14.

46 *See* ALI PRINCIPLES, *supra* note 2, § 4.09 cmt. c ("[T]he incommensurability of the spouses' nonfinancial contributions frustrates any effort to attach monetary value to them. Faced with this measurement difficulty, it may be sensible for the law to presume irrebuttably that the spouses contributed equally to their entire relationship.").

47 On equal division's "expressive function," see Frantz & Dagan, *supra* note 10, at 97.

48 Such gifts may also be considered "lucrative" rather than "onerous." DE FUNIAK & VAUGHN, *supra* note 17, § 62. Onerous title refers to property acquired through a spouse's labor, industry, or other valuable consideration, such as money, services, performance of conditions, etc. Onerous title property is always community property. This reflects the concept that property acquired through the efforts or labor of a marital partner belongs to the marital partnership. Lucrative title, on the other hand, is property acquired by gift, inheritance, or intestate succession. The donor's intention controls the classification of property acquired by lucrative title. If the donor intends for both spouses to benefit from the gift, it is community property. Otherwise, the property remains separate. *Id.*

49 Frantz & Dagan, *supra* note 10, at 117.

particularly the common interest to keep property within one family's bloodline.[50]

The treatment of income from and appreciation of separate property is a source of much angst and debate as jurisdictional rules vary dramatically and some are too murky and untested to produce predictable results.[51] That said, many states focus on whether gains from separate property can be attributed to the active labor, skill, or industry of either spouse. If so, they are likely to be deemed marital. If not—if the spouses were passive—the accrued gains are likely to remain separate.[52]

III. RECONSIDERING THE SANCTITY OF SEPARATE PROPERTY

A closer examination of the current classification system reveals that the labor-centered rule is inherently problematic. This Part first turns to the theoretical inconsistencies of the prevailing paradigm. The Part then shows that in practice, deviations from the partnership principle abound. These deviations reveal a latent ambivalence toward the principle itself and confirm that it is both indefensible and unworkable.

A. Theoretical Inconsistencies

The most fundamental flaw of the partnership theory is its presumption that all spouses are equally invested in the marriage as an economic joint venture.[53] But assuming that spouses with widely divergent extramarital wealth will be equally motivated to pursue remunerative work ignores human nature. Most people work for pay because they want the security and the freedom that money can buy. While some independently wealthy individuals translate their educational and other advantages into more wealth,

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[50] For a historical account of the relationship between marriage and inheritance, see Gary, *supra* note 1, at 571 ("Prior to this century, inheritance between spouses in Western Europe and the United States was rare. As Mary Ann Glendon explains, '[m]arriage was not seen as a reason for shifting family wealth, especially land, from one blood line to another.'" (quoting MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 239 (1989))).

[51] *See* ALI PRINCIPLES, *supra* note 2, § 4.04 reporter's notes cmt. a ("All community-property states agree that the increased value of separate property that results from marital labor is community property, while any 'natural increase' in the value of separate property remains separate. Even within a single state, however, inconsistent methods are used for the allocation of appreciation between these two classifications."); *see also infra* notes 73–76 and accompanying text.

[52] *See* ALI PRINCIPLES, *supra* note 2, § 4.04 cmt. c (explaining that the rule that income from and appreciation of separate property are marital to the extent they are attributable to either spouse's labor "has long been followed in community-property states and is increasingly the rule in the common-law states"). *But see infra* notes 73–76 and accompanying text.

[53] As a legal matter, spouses are formally obligated to act in good faith with respect to marital property. *See, e.g.*, UNIF. MARITAL PROP. ACT § 2(a), 9 U.L.A. 114 (1983) ("Each spouse shall act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse. This obligation may not be varied by a marital property agreement."). Spouses may be sanctioned if they fail to act in good faith. *See* ALI PRINCIPLES, *supra* note 2, § 4.10. These requirements, however, have no impact on the professional choices spouses make.

others are lulled—or crippled—by their inheritances into barely working at all.[54] Even the hard-working wealthy are incentivized to be less risk averse than those without a safety net and to pour their energy into ventures that promise less steady and secure compensation than they might otherwise pursue.

The partnership theory's labor-centered rule also presents line-drawing difficulties. The theory requires that all fruits of both spouses' labor belong to the couple as a unit; excluding gifts and inheritances from the marital pot defeats this principle. Pure gifts—gifts that are wholly motivated by altruism—are rare. In fact, most "gifts" involve some expectation, however slight, of future reward or the satisfaction of an outstanding debt; they result from luck *and* from labor.[55] For instance, a spouse who receives a large inheritance from an aged parent thirty years into marriage may be receiving what is in substance compensation for years of caretaking. The injustice of classifying this "delayed compensation" as separate property would be especially stark where the donee spouse left a paying job to care for the parent. Though community property doctrine has tried to grapple with this

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[54] *See* ANDREW CARNEGIE, *The Advantages of Poverty*, *in* THE GOSPEL OF WEALTH 50, 56 (Edward C. Kirkland ed., 1962); Richard I. Kirkland, Jr., *Should You Leave It All to the Children?*, FORTUNE, Sept. 29, 1986, at 18; Posting of Mark Kleiman to The Reality-Based Community, http://www.samefacts.com/archives/microeconomics_and_policy_analysis_/2005/04/protecting_heirs_from_unearned_wealth_and_sloth.php (Apr. 17, 2005, 12:38 PST) ("People who have accumulated wealth rarely understand how much they damage their children by setting them up so they don't need to do anything.").

These nonearners are often the daughters of wealthy couples. *See* THOMAS J. STANLEY & WILLIAM D. DANKO, THE MILLIONAIRE NEXT DOOR 182 (1996) ("Daughters of wealthy couples tend not to have careers of their own . . . [and] housewives have the highest propensity of all major occupational groups to receive inheritances as well as periodic financial gifts from their parents . . . . In fact, housewives are three times more likely to receive substantial inheritances from their parents than are adult children of the affluent on average.").

[55] *See* MARCEL MAUSS, THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES 14 (W.D. Halls trans., W.W. Norton 1990) (1950) ("[E]verything—food, women, children, property, talismans, land, labour services, priestly functions, and ranks—is there for passing on, and for balancing accounts."); Mary Douglas, *Foreword* to MAUSS, *supra*, at vii, ix ("There are no free gifts; gift cycles engage persons in permanent commitments that articulate the dominant institutions."); Frantz & Dagan, *supra* note 10, at 117–18 ("In many contexts, gift exchange is implicitly reciprocal—gifts are given as payback for favors granted or in anticipation of favorable future treatment. Inheritances, too, may be shaped by labor-related factors, such as one child's willingness to care for her parents in their old age."); C.A. Gregory, *Gifts*, *in* 2 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 524, 524 (John Eatwell et al. eds., 1987) ("Anthropologists stress that while gifts appear to be voluntary, disinterested and spontaneous, they are in fact obligatory and interested."); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 497 (2005) ("Anthropologists have discovered that many economic assets are exchanged between intimates in the form of gifts. This practice of gift exchange, though, involves at least implicit bargaining and self-interest in addition to altruism. Most gifts are given under some degree of social compulsion and with the expectation of receiving something of equivalent or greater value in return. The reciprocation of gifts—whether in the form of material goods and services or social rewards, such as higher social status—is virtually obligatory as a matter of social practice.").

line-drawing difficulty,[56] most gifts and bequests remain presumptively separate, and inquiries into unspoken exchange expectations surrounding wealth transfer, especially within families, are rare.

A similar line-drawing difficulty applies to the proper classification of marital earnings. Earned wealth is hardly ever the result of labor alone; it is almost always attributable in part to pure luck. Most professional achievements depend on any number of factors predating marriage: gender, race, nationality, genetic talents, education, cultural fluency, childhood upbringing, previous employment experiences, and connections. The currency that greases the wheels of professional success may also come in the form of favors that are essentially "gifts"—some of which may be received during marriage. Examples include the friend of the family who gives someone her first job, the former roommate who reveals the inside scoop before a critical interview, and the mentor who pushes someone's application into the right pile. The partnership theory does not—indeed, cannot—decouple these gift-like aspects from property derived from labor.

On the flip side, marital earnings alone may *under*-represent the true accumulation during the marriage, as is the case where one spouse, often the wife, forgoes career opportunities so that the husband can maximize his. In such instances, the most valuable asset generated during marriage may be the husband's enhanced earning capacity. Since this earning capacity will continue to bear fruit after the marriage ends, many commentators believe it should be accounted for at divorce.[57]

A pure (but administratively unworkable) application of the labor-centered rule would recharacterize those portions of gifts that are attributable to effort as marital property and those portions of earnings attributable to unearned privilege as separate property. It might also impose a type of "endowment tax" on born-rich dilettantes—requiring them to make up for their lack of earnings based on a gauge of their unused earning capacity—and add career assets acquired in the course of marriage to the marital property pot.

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[56] *See* DE FUNIAK & VAUGHN, *supra* note 17, at 157–60 (discussing the classification of remuneratory gifts).

[57] Some commentators—but only one jurisdiction (New York)—have recognized that the current cutoff date for earnings attributable to the marriage does not accurately reflect the true accumulation of wealth from the marriage. Not only do professional degrees acquired during marriage often represent a joint investment by the parties, but as a conceptual matter, a much broader category of earnings projected to materialize after divorce may have accrued during the marriage—e.g., developing a patent, composing a symphony, training for the Olympics, starting a business. For discussions of the proper treatment of "career assets," i.e., enhancements to spouses' careers that occur during—and often by virtue of—marriage, see Margaret F. Brinig, *Property Distribution Physics: The Talisman of Time and Middle Class*, 31 FAM. L.Q. 93 (1997); Singer, *supra* note 12; Jana Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won't Fit*, 31 FAM. L.Q. 119 (1997); Brett R. Turner, *Goodwill and Spousal Support*, EQUITABLE DISTRIBUTION J., June 2005, at 61; Brett R. Turner, *Why New York May Be Moving Away from Treating Professional Degrees as Marital Property (and Why Attorneys in Other States Should Care)*, DIVORCE LITIG., July 2004, at 128.

In addition to these line-drawing difficulties, a faithful application of the retroactive contract approach (designing divorce law based on an approximation of what the parties would have negotiated in advance) would likely demand that a portion of preexisting, gifted, and devised property be classified as marital.[58] Note also that most states' intestate succession schemes leave a significant portion of all of the decedent's estate to the surviving spouse without regard to how or when it was acquired.[59] These schemes reflect legislatures' presumption that most people would leave at least some of their separate property to their spouse had they executed a will.[60]

Finally, once the classification process is complete, the two existing approaches to the division of marital property are also problematic. Case-by-case estimations of relative contribution and need are highly subjective, tend to undervalue women's nonmonetary contributions, and produce much uncertainty. Equal division, on the other hand, is too blunt an instrument if the goal is to allocate the fruits of each spouse's labor according to his or her "true" contribution. In the case of spouses who contribute unequal amounts of labor to the marriage, the equal division rule gives lesser contributing spouses a free lunch. The equal division rule is especially unfair from a labor-centered perspective where both spouses earn significantly different amounts and there are no children. It also misses its mark where both spouses earn comparable amounts and where one spouse also shoulders most of the housework and childrearing. In such cases, equal division undercompensates the primary caregiver, who effectively holds two jobs.[61]

B. Deviations in Practice

Given these theoretical inconsistencies, it should come as no surprise that in practice, the application of the labor-centered principle is anything but straightforward. A number of doctrines and trends indicate that in fact, some separate property is often included in the pot of money subject to division at divorce. Thomas Oldham has criticized the liberal use of some of

[58] Lifshitz, *supra* note 26, at 729–30 (suggesting that nonpropertied spouses often rely on their partners' premarital and unearned wealth); *see also infra* Part III.C.

[59] Gary, *supra* note 1, at 572–73 ("In a 1978 survey, a majority of respondents stated they would give all their property to their spouse, even if they were survived by children of the marriage, parents, or siblings. Intestacy statutes, which purport to dispose of a decedent's property in the manner desired by most people, increasingly give the surviving spouse either a substantial share or all of the decedent's estate. Thus, inheritance by a surviving spouse of all of the decedent spouse's property, either by will or by intestacy, is common.").

[60] *See* JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS 62, 65 (2d ed. 2003) ("Many legislators and scholars have concluded that the intestate succession statute should aim to give effect to the probable intent of the decedent . . . . [W]hen testators write wills, they typically leave all or most of their estates to their spouses . . . . So, legislators assume, decedents who don't write wills would also want their spouses to take the bulk of their estates.").

[61] *See supra* note 37 and accompanying text (discussing judicial discretion to deviate from equal division).

these doctrines for "undercut[ting] the marital property system."[62] But in light of the inconsistencies discussed above, the deviations from the principle may be better understood as safety valves through which the system lets off the steam generated by the internal tension of an incoherent paradigm.[63]

For example, many states begin the classification process with a presumption that all property owned by either spouse at divorce is marital property. The burden is on the separate property holder to prove that the property in question did not result from labor performed during the marriage, but rather is traceable to separate property.[64] Many states recognize the transmutation of separate property into marital property where separate and marital funds have been commingled,[65] and a few states allow for transmutation where separate property was used by both parties ("transmutation by use"[66] or "transmutation by implied agreement"[67]), especially in cases in which the spouses' marital home was acquired with separate funds.[68] Though no state has adopted the ALI's recommendation for a bright-line rule transmuting an increasing percentage of separate property into marital property based on the length of the marriage,[69] several states do take the length of the marriage into account at the margins of existing doctrines.[70] Lottery winnings, the ultimate luck-generated property, are generally classified as marital,[71] though not necessarily if they can be attributed to a winning ticket purchased with separate funds.[72]

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[62] Oldham, *supra* note 1, at 248.

[63] *See id.* at 248–49 ("[Some courts] seem more inclined to find a spouse's intent to make a gift of separate property to the marital estate, more willing to find a commingled account uncommingleable, and more disposed to discovering an intention to transmute separate property to marital property. What can explain this? *These courts may question the fairness of the marital property system.* A court can significantly expand the scope of the divisible marital estate by creative use of the notions of commingling and transmutation." (emphasis added)).

[64] *See* OLDHAM, *supra* note 15, § 11.03[1]; Oldham, *supra* note 1, at 222.

[65] *See* OLDHAM, *supra* note 15, § 11.03; Oldham, *supra* note 1, at 221–33, 247–48.

[66] *See* Oldham, *supra* note 1, at 246–47.

[67] *See* OLDHAM, *supra* note 15, § 11.02[2].

[68] *See id.* § 11.02[2] n.18; Brett R. Turner, *Marital Home Update*, EQUITABLE DISTRIBUTION J., Apr. 2005, at 37 (noting a series of cases that recognize that the marital home is not always property of the marriage, but considering the circumstances under which the home can be transmuted into marital property); Brett R. Turner, *Unlikely Partners: The Marital Home and the Concept of Separate Property*, 20 J. AM. ACAD. MATRIMONIAL L. 69 (2006).

[69] *See infra* Part III.C.

[70] *See* OLDHAM, *supra* note 15, § 11.03 ("Courts sometimes reimburse the spouse's separate property that was commingled if the parties divorce after a short marriage.").

[71] *See, e.g.*, Ware v. Ware, 748 A.2d 1031, 1041 (Md. Ct. Spec. App. 2000) (finding that various bank and brokerage accounts held solely in the husband's name were marital property because the assets were purchased with lottery winnings); Damon v. Damon, 823 N.Y.S.2d 540, 541 (N.Y. App. Div. 2006) (holding that proceeds from a winning lottery ticket acquired during marriage constituted marital property); Campbell v. Campbell, 213 A.D.2d 1027, 1027 (N.Y. App. Div. 1995) ("Courts have universally held that the proceeds of a winning lottery ticket acquired by a spouse during the marriage constitute marital property." (citations omitted)); Parker v. Parker, 766 N.Y.S.2d 315, 318 (N.Y. Sup. Ct.

As mentioned above, many states classify income from and appreciation of separate property as marital only to the extent they are attributable to either spouse's labor. This approach requires that gains from separate property be allocated into two parts—one part attributable to labor and another attributable to the separate capital's "natural" growth, with only the former part becoming marital property. But, as the ALI Principles of the Law of Family Dissolution explain, allocations of this sort are inherently difficult and states that follow this labor-centered rule "have been inconsistent in both their choice and application of the allocation method."[73] Other states' treatment of gains from separate property, however, deviates from the labor-centered principle. Some treat all income from separate property as marital,[74] attributing to the marriage property that may be the result of luck, and creating an artificial incentive to invest in non-income-producing assets.[75] Others rule that enhancements to the value of separate property are not marital if they were generated by the spouse who owns the separate

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2003) ("The law is well settled that a lottery prize won during a marriage is generally considered property acquired during the marriage subject to equitable distribution." (citations omitted)); Thomas v. Thomas, 579 S.E.2d 310, 311 n.3 (S.C. 2003) (noting that the lower court correctly found the lottery winnings to be marital property).

[72] Most sources dealing with the classification of lottery proceeds refer to cases in which the winning ticket was purchased out of marital funds. Authority on windfalls traceable to separate property is sparse, but cases and secondary sources imply that they would be classified as separate. *See In re* Marriage of Mahaffey, 564 N.E.2d 1300, 1301 (Ill. App. Ct. 1990) (finding as most significant the undisputed evidence that the money used to purchase the winning ticket came from marital earnings and the right to receive payments became irrevocable during marriage); OLDHAM, *supra* note 15, § 5.03[6] ("If the spouse wins the lottery during marriage by purchasing a lottery ticket with marital funds, the proceeds . . . should be marital."). *But see* Dixon v. Sanderson, 10 S.W. 535, 536 (Tex. 1888) (holding that lottery proceeds from a winning ticket the wife purchased with her separate property were community property because the prize "came as the fortuitous result of a contract based on valuable consideration paid, and is but the profit on a venture, which like other profit, not resulting from the increased value of a thing bought with the separate means of one party to the marital union, becomes the common property of the husband and wife"). *See generally* Katie Foster, Comment, *Dividing Lottery Winnings During Dissolution of Marriage*, 18 J. AM. ACAD. MATRIMONIAL L. 357 (2003) (explaining how a state's property regime (community or separate), timing of winning and disbursements, and other factors affect the divisibility of lottery winnings at divorce); Amy P. Bunk, Annotation, *Division of Lottery Proceeds in Divorce Proceedings*, 124 A.L.R.5th 537 (2004).

[73] ALI PRINCIPLES, *supra* note 2, § 4.05 reporter's notes cmt.b. The ALI describes the two methods as follows: "One method, akin to a *quantum meruit* approach, values the labor input by reference to prevailing compensation rates, and attributes all remaining gain to capital. The other method values the capital input by reference to ordinary rates of return, and attributes all the remaining gain to labor." *Id.* § 4.05 cmt. b. Both methods, however, often produce arbitrary results. *See id.* § 4.05 cmt. b, at 669–70, reporter's notes cmt. b, at 681.

[74] *See id.* § 4.04 cmt. a ("Most community-property states follow the 'American rule' under which both income and appreciation retain the separate-property character of the underlying asset, but a minority follow some version of the 'Spanish rule' under which the income is community. The common-law states are more difficult to classify because their law on this question is not as well developed, but [as a] general pattern, . . . many, if not most, follow the 'American rule.'").

[75] This incentive may ultimately be detrimental to both parties if the investments fail to maximize the profits from the property.

property, thus excluding from the marital pot property that, according to the partnership logic, should be included in it.[76] The treatment of income from and appreciation of separate property is thus especially illustrative of the law's half-hearted embrace of the labor-centered paradigm.

Once the classification process is complete, some equitable distribution statutes specifically direct judges to take separate property into account in the division of marital property.[77] Some statutes allow courts to consider[78] depletion of separate property for marital purposes.[79] Additionally, as we have seen, while some states direct judges to take contribution into account at the distribution stage, others dilute this principle with other factors or reject it altogether by imposing an equal division rule. In one divorce case, for example, a self-made multibillionaire argued that his wife should not be entitled to half of the fortune he accumulated during their twenty-eight year marriage because it was attributable not only to his efforts but primarily to his "genius." Implicitly, he was arguing that a large part of his earnings were the result of an attribute inherent to him that he had possessed from birth—the ultimate luck-generated property. The court ruled that the husband's earnings were marital property and divided them equally between

[76] *See* ALI PRINCIPLES, *supra* note 2, § 4.04 reporter's notes cmt. c ("While the principle of a community of labor is central to the community-property system, its reception in the common-law states has been uneasy, even after decades of equitable-distribution reforms. Section 14 of the Uniform Marital Property Act provides a recent example. This section establishes a marital-property interest in separate capital when the capital's value is enhanced by the labor of the other spouse, but not where the value is enhanced by the labor of the spouse who owns the separate capital. The language of both the section and its commentary suggest the drafters' view that one spouse must provide a substantial labor input in order to 'earn' a share in the appreciation of the other's separate capital; the labor of the spousal owner of the separate property creates no similar entitlement by his spouse. It is thus apparent that while UMPA follows many community-property principles and is often described as a community-property law, as to marital labors it adopts a conception that departs from the fundamental community-property view that marriage assumes a commitment of all one's labors to the benefit of the marital community."). For further discussion of the difficulty in allocating increases in the value of separate property according to spouses' labor, see David Westfall, *Unprincipled Family Dissolution: The American Law Institute's Recommendations for Spousal Support and Division of Property*, *in* RECONCEIVING THE FAMILY 176, 188–89 (Robin Fretwell Wilson ed., 2006).

[77] *See* MICHAEL ASIMOW ET AL., VALUATION AND DISTRIBUTION OF MARITAL PROPERTY § 19.09 (2007) ("[S]ome jurisdictions specifically direct that the court consider as a factor in making equitable distribution the value of any separate property set apart to the parties."); FAMILY LAW AND PRACTICE, *supra* note 16, § 37.06; OLDHAM, *supra* note 15, § 13.02[1]; Shapo, *supra* note 21, at 712–13 ("Several community property states . . . permit equitable division of community property at divorce if one spouse would suffer economic hardship because of unusual circumstances, or if there are 'compelling reasons' to do so, and almost all also permit payments for support.").

[78] *See* ALI PRINCIPLES, *supra* note 2, § 4.10.

[79] ASIMOW ET AL., *supra* note 77, § 19.09 n.3; *see* COLO. REV. STAT. § 14-10-113(1)(d) (2007) (providing that a court may consider as a factor depletion of separate property for marital purposes); *see also* Hayes v. Hayes, 792 S.W.2d 428, 431 (Mo. Ct. App. 1990) (finding that the fact that a spouse's separate property was contributed to the acquisition of marital property or used for marital living expenses was a permissible factor to consider in dividing property); Zacharek v. Zacharek, 498 N.Y.S.2d 625, 626 (N.Y. App. Div. 1986).

the spouses.[80] Additionally, some "hybrid" states follow the general rule that only marital funds are subject to distribution, but permit the invasion of separate funds where severe hardship would otherwise result.[81]

Outside of the divorce context, some jurisdictions' spousal disinheritance laws blatantly contradict the labor-centered principle. Community property states maintain the distinction between community and separate property at death; surviving spouses are entitled to fifty percent of the property accumulated through labor during the marriage, and deceased spouses' estates include the remaining fifty percent, not more.[82] But in some non-community property states[83] and under the 1990 Uniform Probate Code,[84] the property subject to the elective share or "forced share"—the property reachable by a disinherited spouse—includes all of the testator's property. In these states, disinherited surviving spouses may, depending on the circumstances, receive more by electing against a will than they would at divorce under labor-centered partnership principles. On the other hand, in some cases surviving spouses may be left with less than they "deserve" under partnership principles—e.g., where the survivor is entitled to less than one-half of the decedent's estate and where this entire estate is composed of

[80] deCastro v. deCastro, 616 N.E.2d 52, 56 (Mass. 1993).

[81] *See* Oldham, *supra* note 1, at 219.

[82] *See* Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 97–98 (1994) ("Because equal ownership of all community property is recognized prior to the death of either spouse, the need for a forced or elective share is eliminated. The survivor retains her separate property and her one-half interest in the community property, while the decedent's separate property and his one-half interest in the community property pass pursuant to his will or through intestacy.").

[83] *See, e.g.*, Harriet Newman Cohen, *To Have or Have Not (A Prenuptial Agreement)*, N.Y. L.J., Aug. 7, 2006, at 9, 12 (2006) ("[In New York, u]nlike divorce law, estate law does not distinguish between separate and marital property. Therefore, unless a prenuptial agreement provides otherwise, a surviving spouse will inherit not only 'marital' property, but 'separate' property as well. This is also true in more seasoned marriages when 'marital' property is insufficient to satisfy the elective share."); Gary, *supra* note 1, at 592–93 (1995) ("[T]he Delaware [elective share] statute is based solely on the decedent's estate. There is no attempt to base the elective share on marital property, no attempt to include marital property held in the surviving spouse's name, and no attempt to exclude the decedent's separate property.").

[84] UNIF. PROBATE CODE § 2-203, 8 U.L.A. 103–04 (amended 1993). Note however that the UPC's scheme, while not technically faithful to the partnership theory, was aimed at allocating to the surviving spouse only labor-generated property. *See id.* at art. II, pt. 2, gen. cmt., 8 U.L.A. 93, 95 ("The redesigned elective share is intended to bring elective share law into line with the partnership theory of marriage."). The drafters conceded that a community property model was theoretically ideal, but they decided it was unworkable because of tracing problems. They also rejected a discretionary equitable distribution-style scheme as inappropriate because the deceased spouse would not be present to protect her interests and because of its unpredictable nature. Instead, the UPC drafters devised an "accrual-type" elective share. The surviving spouse would be entitled to a gradually increasing percentage of the augmented estate which would include all of the testator's property, starting from zero after one year and increasing to fifty percent after fifteen years of the marriage. Because the augmented estate includes both marital and separate property, the scheme aims to approximate a partnership-type result by presuming that the portion of the augmented estate attributable to joint efforts will grow over the course of the marriage. *See* Waggoner, *supra* note 21; Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223 (1991).

property earned in the course of the marriage.[85] Thus, commentators who support the labor-centered paradigm complain that schemes like the UPC's "fail . . . to apply the marital partnership theory."[86]

C. Existing Proposals

Despite these tensions, most authorities hold fast to the labor-centered partnership concept. Recently, however, scholars Carolyn Frantz and Hanoch Dagan have offered an alternative, explicitly arguing that "labor should not be the standard for inclusion in the marital estate."[87] Instead, they suggest a temporal standard for inclusion of some separate property in the marital pot. A similar scheme, which itself informed Frantz and Dagan's, can be found in section 4.12 of the ALI Principles of the Law of Family Dissolution.[88]

The ALI and the Frantz-Dagan models recharacterize a gradually increasing percentage of preexisting property as marital based on the length of the marriage. In the case of gifts and inheritances received during marriage, the ALI and Frantz and Dagan diverge. The ALI recommends that the duration of the marriage as well as the time since the property's receipt—the "holding period"—determine the recharacterized percentage.[89] This ensures, for example, that even in long-term marriages, property inherited on the eve of divorce will remain separate. Frantz and Dagan, by contrast, believe that gifts and inheritances received during marriage should be classified as marital based not only on the length of the marriage, but also on the duration of the relationship between the donor and donee, regardless of how long the gift has been held. Under their scheme, each gift or inheri-

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85 *See* Rosenbury, *supra* note 1 (surveying differences between state defaults regarding distribution of property at divorce and protections against spousal disinheritance); Waggoner, *supra* note 21, at 48–49 (illustrating cases in which the traditional elective share overcompensates and undercompensates the surviving spouses as compared with the fifty-fifty partnership principle).

86 Gary, *supra* note 1, at 589 ("The drafters of the 1990 UPC sought to use the fifteen-year phase-in provision to confront the problem of including nonmarital property in the augmented estate. Although the phase-in may help in some cases, the arbitrary nature of the formula fails to solve the problem. Under many scenarios, the resulting elective share amount will not equal one-half of the marital property. For example, property owned by spouses married five years could be entirely marital property. On the other hand, property could be substantially separate if it was owned by spouses who began a fifteen-year marriage after or near retirement. Another way in which the 1990 UPC fails to apply the marital partnership theory is in its treatment of an independently wealthy surviving spouse. The . . . approach of the UPC means that separate assets of both spouses are included in the estate to which the elective share percentage is applied. Separate assets of the surviving spouse are then charged against that spouse's elective share amount. The result is that a spouse who has contributed a lifetime of energy and work in amassing a couple's marital estate may be denied any part of that property if the value of that spouse's independent wealth is greater than that of the marital estate."); *see also* Charles H. Whitebread, *The Uniform Probate Code's Nod to the Partnership Theory of Marriage: The 1990 Elective Share Revisions*, 11 PROB. L.J. 125 (1992).

87 Frantz & Dagan, *supra* note 10, at 117.

88 *See* ALI PRINCIPLES, *supra* note 2, § 4.12.

89 *Id.* § 4.12(2).

tance would be multiplied by the ratio that the length of the marriage bears to the relationship between the donor and donee. The result is the amount that is deemed marital property. Thus, for example, "[i]n the case of a gift from a parent to a child who is fifty-two years old, and who has been married eight years, 8/52 (or 2/13) of the gift's value should be marital property."[90] This formula is designed to determine the "extent to which a gift reflects a relationship cultivated during marriage."[91] The remaining eleven-thirteenths in the same example would be separate because they are attributable to a relationship cultivated before the marriage.

Both the ALI and Frantz and Dagan justify a standard centered on length of marriage by reference to spouses' likely intent and expectations. The ALI reporters explain:

> [An underlying premise of the rule] is that a spousal sense that property is communally rather than individually owned has its source in the relationship of the parties, and marital duration provides an administrable measure of that relationship that can be used absent special circumstances. The more intertwined the spouses lives have become, the more readily they will expect to share one another's good or bad fortune . . . . A sense of communal ownership will develop more rapidly for separate assets received in the 25th year of marriage than in the fifth.[92]

In Frantz and Dagan's words:

> [Transmutation of separate property] reflects the reality of marriage—many spouses do in fact intend to give some of their separate property to the community while it exists. This is due, we think, to two phenomena: the moral imperative to share all one has with a loved one in financial need (for instance, a spouse who refuses to pay for the costs of a medical crisis out of separate property has failed in the duties of love), and the fact that, over time, spouses feel less need and less desire to guard against the possibility of divorce and remarriage. For the latter reason, we agree with the ALI . . . that the length of the marriage is in general a good proxy for intent to transmute separate property.[93]

Because both proposals are rooted in the parties' presumed intent and expectations, both allow property owners to opt out of the rule.[94] At the same

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[90] Frantz & Dagan, *supra* note 10, at 118 n.195.

[91] *Id.* at 118; *see also id.* at 117–18 ("Gifts and inheritances reflect marital good fortune or labor performed during marriage, but they do so only partially. Both the luck and the labor may precede the marriage. This is particularly true of gifts or inheritances from family members who have had lifelong relationships with the donee far exceeding the length of the marriage.").

[92] ALI PRINCIPLES, *supra* note 2, § 4.12 cmt. b, at 772; *see also id.* § 4.12 cmt. a, at 771; *id.* § 4.12 reporter's notes cmt. a, at 781–82.

[93] Frantz & Dagan, *supra* note 10, at 114–15.

[94] ALI PRINCIPLES, *supra* note 2, § 4.12 cmt. a ("[The effect of the rule] is to establish that spouses who live together for many years commit at least some of their resources to one another, in a proportion that increases with the duration of their relationship, *unless there is good reason to think that they did not intend that result.*" (emphasis added)); Frantz & Dagan, *supra* note 10, at 115 ("Of course, spouses

time, Frantz and Dagan retain the doctrine of transmutation by use.[95] Thus, even where a propertied spouse has explicitly communicated that he or she does not intend to transmute separate property, if it was used by both spouses during marriage—such as with a marital home—such property is classified as entirely marital, with the original owner having a right of first purchase. The ALI is silent on transmutation by use. Thus, where a valid opt-out exists and the parties share separate property, the property would likely retain its separate character.[96]

While these approaches improve upon a blanket exclusion of unearned and premarital property from the marital pot, and while they correctly focus on the duration of the marriage as one of the keys to a more rational paradigm, they are incomplete. The suggestion that separate property be recharacterized as marital based on the length of the marriage relies on an assumption that as marriages last longer, spouses' expectations that their union should translate into a merger of financial interests grow stronger. While this may be so, the precise relationship between marriage duration and sharing expectations will vary from one couple to the next, as well as within each marital unit.[97] It is therefore unsurprising that the ALI and Frantz and Dagan include only a rough suggestion regarding how the gradually increasing percentage should be set.[98] Ultimately, the formula can

should be allowed to easily and unilaterally opt out of this default rule."). The ALI allows unilateral opt-out only with respect to gifts and inheritances received during marriage. For premarital assets to remain separate, both parties must enter a premarital agreement. *See* ALI PRINCIPLES, *supra* note 2, § 4.12 cmt. c, at 776–77. That said, section 4.12(6) preserves the separate property owner's interests if "necessary to avoid substantial injustice." This provision, in combination with the italicized language above, implies that unilateral opt-out might be respected were the rules put into effect. *See also* Lifshitz, *supra* note 26, at 734 (suggesting that spouses with premarital or unearned assets should bear the burden of notifying their partner of their intention to keep such property separate and that absent such notification, the nonpropertied spouse may be entitled to "reliance damages").

95 Frantz & Dagan, *supra* note 10 at 116 ("[T]here is one circumstance where property should be transmuted regardless of intent—when items are used during marriage.").

96 *See* ALI PRINCIPLES, *supra* note 2, § 4.12.

97 The ALI's reporter's notes themselves acknowledge the tenuous basis for the ALI's proposed approach. *See id.* § 4.12 reporter's notes cmt. a ("Data on what spouses actually expect in their marriage are sparse, so this section necessarily rests on assumptions about those expectations. Of course, assumptions are required regardless of how the issue addressed by this section is resolved. . . . The data suggest that economic decisions made during marriage are largely premised on the assumption that the marriage will continue, which is a premise of this section. Another premise of this section, that after 30 or 35 years of marriage most people will expect that property their spouses brought into the marriage will be available to them jointly upon retirement or in an emergency, remains untested. However, the courts of hotchpot states may share this assumption, for they appear more likely to allocate inherited or premarital property to the other spouse at the dissolution of a lengthy marriage than at the dissolution of a short one." (citations omitted)).

98 The only parameter offered by the ALI concerning premarital property is that the recharacterized portion increases over time from zero in the case of short (two- or three-year) marriages to one hundred percent in the case of thirty- to thirty-five-year marriages. *Id.* § 4.12 cmt. b, at 773. The recharacterization of gifts and inheritances received during marriage is addressed in section 4.12(2), which provides:

only match expectations if it is determined on a case-by-case basis. How long must a marriage last for twenty-five percent of premarital property to belong to the couple? A standard scheme is bound to seem arbitrary from within a given relationship.

Frantz and Dagan's suggestion that a portion of gifts and devises should be classified as marital based on the length of the marriage and the length of the donor-donee relationship is also problematic. If, as they claim, the classification of premarital property should be based on length of marriage regardless of how the property was acquired, why should gifts and inheritances received during marriage be treated differently? Why, for example, should a spouse who inherits $1 million one day before the wedding have to contribute a different amount to the marital pot than a spouse who receives the same amount one day after the wedding? Why should a spouse who receives a gift from a lifelong friend have to contribute less than one who receives the same amount from a recently "cultivated" relationship? Donor intent cannot explain the difference because preexisting property—to which Frantz and Dagan apply the length-of-marriage formula—may also include gifts and inheritances. Additionally, Frantz and Dagan themselves acknowledge that donor intent should not be dispositive in the classification of gifts as marital or separate.[99] They explicitly reject the labor-centered classification standard and argue that gifts reflect luck as well as labor, yet their classification of gifts and inheritances as marital only to the extent they "reflect[] a relationship cultivated during marriage"[100] echoes the old paradigm that they purportedly reject. A gift or inheritance that is truly viewed by all parties—donor, donee, and donee's spouse—as external to the marriage should be designated as such through explicit agreement. The default rule, if Frantz and Dagan's own principles are followed, should classify property based on its prospective meaning to the spouses, not on its source.

In sum, both the ALI's and Frantz and Dagan's proposals attribute to the marriage a portion of property currently classified as separate, but neither method provides a concrete answer to the question of how much premarital or unearned wealth should be shared in marriage.[101] Length of the

> A portion of separate property acquired by each spouse during marriage should be recharacterized at dissolution as marital property if, at the time of dissolution, both the marital duration, and the time since the property's acquisition (the "holding period"), exceed the minimum length specified for each in a rule of statewide application.
>
> (a) The percentage of separate property that is recharacterized as marital property under Paragraph (2) should be determined by a formula, specified in a rule of statewide application, that takes into account both the marital duration and the holding period of the property in question.
>
> (b) The formula should specify a marital duration and holding period at which the full value of the property is recharacterized at dissolution as marital property.

Id. § 4.12(2).

[99] *See* Frantz & Dagan, *supra* note 10, at 117; *see also infra* Part IV.

[100] Frantz & Dagan, *supra* note 10, at 118.

[101] For a further critique of section 4.12 of the ALI Principles, see Westfall, *supra* note 76, at 956–58.

marriage and holding period on their own do not translate into a nonarbitrary recharacterization amount. Moreover, looking to the length of the donor-donee relationship takes a step backwards, returning to the flawed labor-centered paradigm.

IV. BEYOND THE LABOR-CENTERED PARADIGM

As we have seen, the current marital property classification system is neither sound in theory nor followed strictly in practice. But while transmutation and other doctrines mean that the labor-centered rule is followed only partially, they result in tremendous uncertainty regarding the likely outcome of any given divorce. The discretionary application of many of these deviations also creates the impression that divorce decisions are arbitrary and unfair. Some doctrines also create an incentive for spouses to keep property separate and to share as little as possible unless they are prepared to allow the entire property in question to be characterized as marital. The "excuses" for attributing separate property to the marriage employed by the doctrinal deviations seem like just that—excuses for overriding a seemingly sacred principle. The problem is the principle itself.

A. Marriage as Merger of Risk and Reward

1. The Risk and Reward Paradigm.—Fortunately, the kernels of a more coherent recharacterization approach are contained in two aspects of Frantz and Dagan's overarching theory of marriage to which they give short shrift in their discussion of preexisting, gifted, and inherited property. First, they argue that one of the unique and essential characteristics of marriage is its communal dimension. Specifically, marriage fuses spouses' interests such that "what is good for one spouse must affect what is good for the other."[102] "[S]pouses," the authors explain, "perceive themselves at least partially as a 'we,' a plural subject, that is in turn a constitutive feature of each spouse's identity as an 'I.'"[103] Central to this view of the communal aspect of marriage is the notion that "sharing life and its projects requires spouses to pool their efforts and their rewards, 'each operating on joint behalf of both.'"[104] Spouses do not view collective benefits such as pooling of resources and economies of scale in a mercenary way as individuals might in a nonintimate partnership context, but rather as benefits that accrue to the unit as a whole. "Sharing the advantages of life together as well as its difficulties is the linchpin of [the marital] community."[105]

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[102] Frantz & Dagan, *supra* note 10, at 82.

[103] *Id.*

[104] *Id.* at 83 (quoting Simon Gardner, *Rethinking Family Property*, 109 LAW Q. REV. 263, 283 (1993)).

[105] *Id.* at 82.

Second, Frantz and Dagan believe that spouses are expected to make roughly comparable contributions to the marriage. That said, these contributions need not have comparable market values. What is critical is spouses' commitment to *long-term reciprocity of effort and personal investment.*[106] Another central pillar of Frantz and Dagan's ideal of marriage is the principle of equality. "[I]t would be perverse," they write, "to conceive of a marriage . . . where one spouse has a recognized controlling interest in the property that partially constitutes the marriage, and, correspondingly, in marital decisions . . . . As subordination in marriage is a threat to a spouse's basic personhood, the marital community must be bounded by a commitment to equality."[107]

Extrapolating from these ideas, I posit that marriage at its core should be understood as a commitment by spouses not only to labor for the unit, but also to share more broadly in the opportunities and vulnerabilities that characterize who they are financially for the duration of their union. As Milton Regan put it, by marrying, "[s]pouses agree in essence to pool their risks in face of an uncertain future."[108] Money shapes our identities in fundamental ways. It determines where we live, the kind of work we do, and the level of medical care we receive.[109] Money and money worries play a central role in our sense of safety or danger, possibility or constraint, peace or anxiety. Sharing risks and rewards enables spouses to combine these core elements of their individual identities during marriage.

This theory of marriage as a merger of risk and reward is consistent with widely held contract-based and normative intuitions. Most Americans assume that marriage turns separate individuals into a risk-sharing unit. Most people would also agree that requiring only workers to share is unfair.

What, then, does the merger of risk and reward translate into? Marriage as merger of risk and reward clearly supports the sharing of earnings. Earnings are power. Earnings shape one's sense of security, freedom, and opportunity, influencing decisions that in a marriage necessarily impact both spouses—whether and when to have children, what type of schooling and healthcare they will receive, where to live, and how much money should be set aside for emergencies. Allowing the high-earning spouse to

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[106] *Id.* at 89–90 ("Communal marriage does not require that a spouse accept an arrangement where she is being exploited, expected to expend a disproportionate amount of effort, and yet reaping relatively little in the way of reward. There are, in other words, limits to acceptable asymmetric contribution within the ideal of communal marriage. But these limits are not based on the metric of desert for labor in the sense of each spouse insisting upon receiving benefits in proportion to individual market-valued contribution. Instead, *marriage operates on a metric focused on individual effort.* Though the joint endeavor need not be the product of similar market contributions, it should be the product of *similar personal investments* in the success of the marital endeavor." (emphasis added)).

[107] *Id.* at 91.

[108] REGAN, *supra* note †, at 147.

[109] For a poignant account of the relationship between wealth and health, see Janny Scott, *Life at the Top in America Isn't Just Better, It's Longer*, N.Y. TIMES, May 16, 2005, at A1.

retain earnings separately would go against the heart of the notion that marriage means a joining of lots.

Before addressing the concrete implications of this view of marriage as a union of risks and rewards, it should be noted that although the main flaw of the current paradigm is its exclusive focus on contributions of labor, this is not to say that spouses do not presently conceive of the fruits of marital labor as a joint endeavor. They often do. But the lens through which spouses view "contribution" is not exclusively tied to labor; it is broader. In marriage, contribution includes many things that go beyond the pooling of work and earnings. Spouses who are a good team set aside their individual preferences for the benefit of one another, making sacrifices that from a purely monetary perspective may seem wasteful: they move to new cities so their partner can take a job that is more rewarding, they take up hobbies they would otherwise happily live without, they tend to in-laws, they change their religious affiliation, they confront their demons, they compromise. Marriage works when spouses engage in a carefully calibrated dance that leaves both partners feeling safe and valued.

A key ingredient of fairness between husbands and wives is their willingness to make relatively similar sacrifices for the benefit of the collective unit. While Frantz and Dagan are correct that striking a fair balance in these sacrifices—or "personal investments"—is necessarily subjective to each couple, it is not true that all such sacrifices are impossible to measure and enforce externally. A breadwinning husband may contribute to marriage in any number of unquantifiable ways, but his wages are clearly quantifiable elements of his financial capability during marriage, and as such, they are properly classified as marital at divorce. A spouse who owns premarital or gifted property also has a clearly quantifiable degree of financial capability during marriage. Exempting this capability from the marital community is inconsistent with the view of marriage as an all-for-one proposition.

On its face, the view of marriage as merger of risk and reward implies that sharing should be total, however and whenever property is acquired. If marriage truly represents a complete fusion—an identity of interests, risks, and aspirations—allowing spouses to retain extramarital wealth cuts against the very heart of the notion that they have thrown their lots together. Frantz and Dagan acknowledge this but reject a complete merger rule on expediency grounds, arguing that the reality of multiple marriages would render it unfair and unworkable. Total merger would privilege first spouses and their children over propertied individuals' subsequent families. As the authors put it:

> If preexisting property were included in the marital community, the first marriage would be privileged over others that may come later. The first spouse would share not only the fruits of the marriage, but also the fruits of the other spouse's premarital activities. To avoid the complete colonization of a spouse's life, thus penalizing subsequent marriages, law must acknowledge the

> possibility, however undesirable, that the period of marriage (and thus sharing) may come to an end. Therefore, spouses should be expected to share the benefits and burdens of their life together, not those of their lives before . . . the existence of the marital community.[110]

But this concession to reality lacks conviction. Rather, I suggest that a total merger of all property is wrong in principle, because marriage commits spouses to share upside and downside potential *only so long* as they are married.[111] Even where neither party remarries, after divorce the paths of ex-spouses typically diverge. Just as a spouse entering marriage with a certain earning capacity must generally share only income earned *during marriage*, a spouse entering marriage with separate property should have to share only part of that property, a part that corresponds to the freedom and risk which that money bestows during the marriage.[112] Classifying all preexisting and unearned property as marital would be as nonsensical as classifying all spouses' pre- *and post*-divorce earnings as marital. With few exceptions, postdivorce earnings belong to ex-spouses individually. The traditional partnership-theory rationale for this rule is that they were not a product of labor expended during the marriage. A more sensible rationale is that postdivorce earnings are not a part of the couple's collective financial capability during the marriage.[113] By the same token, property currently classified as separate should be allocated at divorce between two categories—one attributable to the marriage and the other attributable to the owner spouse's postdivorce life. In other words, if we think of the freedom contained in a given asset as something that can be spread over the owner's expected lifespan, the part spread over the years of the marriage—and only that part—should be classified as marital property divisible at divorce.

2. *The Risk and Reward Allocation Formula.*—What would this concept translate into in practice? The risk and reward formula attributes property acquired before marriage—preexisting property—to the marriage in the same proportion as the duration of the marriage bears to the length of time the property would have been expected to last—the owner's life expectancy as of the start of the marriage. In other words, marital property includes:

$$\text{Value of preexisting property} \times \frac{\text{Length of the marriage}}{\text{Owner spouse's life expectancy}}$$

[110] Frantz & Dagan, *supra* note 10, at 113.

[111] As Frantz and Dagan put it, "spouses should be expected to share the benefits and burdens of their life together, not those of their lives before (or after) the existence of the marital community." *Id.*

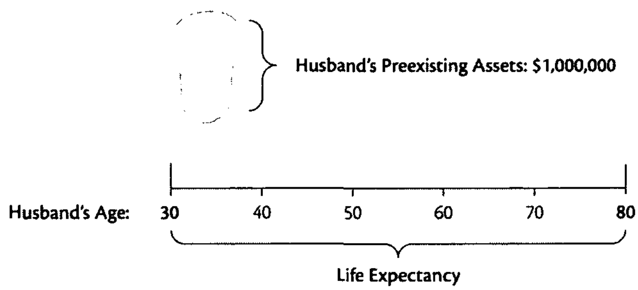
[112] Unlike income, which is reasonably expected to continue with some regularity after the marriage ends, preexisting property and one-time gratuitous receipts frequently will not. On the contrary, they are expected to last over time, for a period extending much beyond the year in which they were received.

[113] *But see* Goldfarb, *supra* note 13, at 363–64 (arguing that marital roles influence postdivorce earning power).

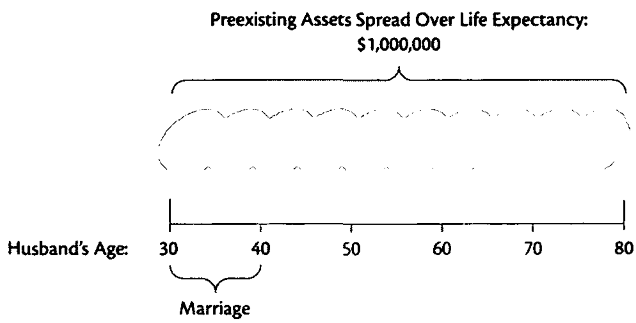
Property received during marriage—gifted or inherited property—should be attributed to the marriage in the same proportion as the property's holding period (the length of time from receipt until the commencement of divorce proceedings) bears to the owner's life expectancy as of receipt. Thus, marital property also includes:

$$\begin{array}{c}\text{Value of gifted or} \\ \text{inherited property}\end{array} \times \frac{\text{Holding period}}{\text{Owner spouse's life expectancy}}$$

For example, assume Husband and Wife are both thirty years old when they marry. They are both expected to live until eighty.[114] Husband enters the marriage with $1 million. Wife has no preexisting property.

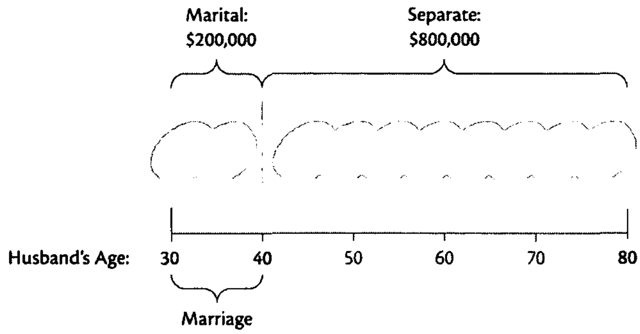


Ten years later, when the spouses are forty, they divorce. At that time the husband's entire $1 million in preexisting holdings are intact. In order to figure out how much of the husband's property will be attributed to the marriage, we will need to spread the $1 million evenly over his life expectancy.



[114] For simplicity, this example and the following use eighty as the average life expectancy for all individuals. In fact, life expectancy rises with age and is generally higher for women than for men. For a succinct table correlating age, gender, and life expectancy, see Social Security Online, Actuarial Publications, Period Life Table, http://www.ssa.gov/OACT/STATS/table4c6.html (last visited Sept. 7, 2008).

The portion allocable to the marriage will bear the same proportion to the total property as the length of the marriage bears to his life expectancy—in other words, one-fifth (ten years of marriage divided by his fifty-year life expectancy). Thus $200,000 will be classified as marital property subject to division at divorce. The remaining $800,000 will be his separate property.



If Husband and Wife are twenty when they marry and thirty when they divorce, the applicable ratio would be one-sixth (ten years of marriage divided by Husband's sixty-year life expectancy) and only $166,667 of the $1 million would be marital, leaving the husband with $833,333 for his longer postdivorce life.

Suppose again the spouses are thirty years old when they marry, but instead of entering the marriage with his $1 million, the husband inherits it eight years into the marriage when he is thirty-eight years old. In that case the inheritance will be classified using the second equation. It will be attributed to the marriage based on the length of time from receipt to divorce and on his life expectancy as of the date of receipt. Thus, dividing the holding period, two years, by life expectancy as of receipt, forty-two years, gives 1/21. Thus, 1/21 of the inheritance, or $47,619, will be classified as marital.

By integrating the age of the owner spouse as well as the length of the marriage or holding period, the formula arrives at a recharacterization percentage that is both principled and fair. It requires both spouses to contribute comparably out of the resources available to them during the marriage—whether acquired before or during marriage, through labor or luck—thus joining their efforts as well as their allocable-to-the-marriage fortunes. The life expectancy component of the formula translates each spouse's wealth into a figure that represents what that wealth means *to them* during the marriage. The result ensures that similar levels of financial risk and security are attributed to both parties even where the spouses enter marriage with disproportionate external resources. At the same time, it protects affluent spouses by limiting the amount by which a failed marriage may deplete their estate to one-half of the recharacterization percentage—in short-term marriages this amount will be relatively small. The parties' life expectancy would be based on an objective standard, such as the actuarial tables promulgated by the Internal Revenue Service.[115]

The system would treat all income from separate property as marital regardless of whether it represents the fruits of either spouse's labor. Again, income would belong to the marriage only for its duration; thus, a propertied spouse would only be contributing for the fraction of her lifetime during which she is married. Like earnings, income from separate property represents a slice of ongoing financial capability, which, if kept separate, would put spouses in fundamentally different positions. The same is true of distributions from trusts. Like income, they would be classified as marital property.

A portion of debts incurred prior to marriage would be characterized as marital according to the same formula applicable to premarital property. Thus if the wife marries at thirty with $10,000 in debt from medical treatments and the marriage lasts ten years, one-fifth (ten years of marriage divided by fifty years in life expectancy) of that debt, or $2000, will be marital. Debts incurred during marriage would be marital unless they were incurred to maintain separate property, in which case they would be attributed to the marriage in the same proportion as the underlying property.

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[115] The U.S. Department of Treasury publishes these tables for purposes of valuing annuities, interests for life or terms of years, and remainder or reversionary interests. *See, e.g.*, INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUBL'N NO. 1457, ACTUARIAL VALUES BOOK ALEPH (2007). Some jurisdictions already consider spouses' ages in divorce proceedings. However, age is generally related to the spouses' postdivorce needs rather than the backward-looking entitlement accrued in the course of marriage. Under my proposal, by contrast, age functions as an aid in determining the subjective financial capability of each spouse for the duration of marriage. *See, e.g.*, Maynard v. King, 906 A.2d 849, 852 (Del. Fam. Ct. 2006) (holding that a sixty-forty division of property in favor of the husband was appropriate, in part, because "[h]usband is clearly in worse health than wife, and also has the disadvantage of having less opportunity for future advancement and increases in salary because of his age"); Heinz v. Heinz, 632 N.W.2d 443, 449 (N.D. 2001) (affirming the trial court's award of spousal support in part because the likelihood of the wife to "substantially increas[e] her earnings by obtaining a bachelor's degree is lessened by the difficulty she may have entering the job market at an advanced age"); *see also* Alan D. Scheinkman, *Practice Commentaries*, *in* N.Y. DOM. REL. LAW § 236, C236B:25 (McKinney 1999) ("The age and health of the parties are . . . relevant to consideration of the future financial conditions of the parties. Advanced age or ill health may preclude a spouse from the pursuit of a full-time career and may, thus, warrant receipt of a greater share of marital assets. . . . [R]elative youth may indicate that the spouse would be able to achieve relative financial security by his or her own efforts."). When parties are of roughly equivalent age, health, and economic station, courts are reluctant to award one spouse a greater share of the marital estate or invade a spouse's separate property for the benefit of the other. *See* Wiegers v. Wiegers, 467 N.W.2d 342, 346 (Minn. Ct. App. 1991) (finding that an invasion of nonmarital property for the other spouse was unwarranted because both parties were elderly, in poor health, and neither had any likelihood of obtaining employment or acquiring additional assets, and thus, neither party could demonstrate that a hardship was created by a property distribution that did not include an award of either party's nonmarital property to the other); *cf.* Edinger v. Edinger, 724 N.W.2d 852, 856 (S.D. 2006) (holding that the trial court's award of the parties' entire net worth to the husband was inequitable "considering the parties' similar age, health, competence to earn a living, and contributions to the accumulation of property").

Thus, if the wife incurs the medical debt in year five of the marriage, the entire amount would be marital. Suppose instead that the wife marries owning a $300,000 summer home and during the marriage borrows $30,000 to maintain the property. If the marriage lasts ten years out of her fifty-year life expectancy, then at divorce one-fifth of the house, or $60,000, would be marital property, and one-fifth of the debt, or $6000, would also be considered incurred to maintain the marital property. The remaining debt of $24,000 would be separate.[116] Mirroring the treatment of interest earned in the course of marriage, interest payments made during marriage would be marital.

As in the examples above, the recharacterization percentage would be based on the value of assets at the front end: premarital assets would be valued at the outset of marriage, and gifts and devises would be valued when received. Nonliquid assets would be valued a second time at the back end—i.e., at divorce—to determine their appreciation or depreciation, which would be attributed in full to the marriage. This rule ensures that appreciation of separate property is attributed to the marriage in the same fashion as income and that depreciation is attributed in the same fashion as debt.

Thus, in the first example above, if our thirty-year-old husband enters the marriage with a house worth $1 million, and if ten years later the house is worth $1.6 million, in addition to one-fifth of the front-end value ($200,000) being marital, the entire $600,000 in appreciation would be marital as well. As a result, the proposal removes the current uncertainty surrounding the treatment of income from and appreciation of separate property. In jurisdictions that treat separate property-generated income as marital and appreciation as separate, the proposal would eliminate the artificial incentive to invest separate property in non-income-producing assets. If the value of the husband's house fell, say to $900,000, then one-fifth of the initial $1 million, or $200,000, would be marital, but also the entire $100,000 loss would be marital. Thus the final accounting for the house would produce $100,000 for the marital pot.

Separate property spent during marriage would be presumptively marital. Thus, in the first example where the husband brought $1 million into the marriage, if more than $200,000 of this amount were spent in the course of the ten-year marriage, there would be no credit to his separate account at divorce. Whatever was left would simply be separate. If less than the $200,000 allocable to the marriage were spent, say $50,000, then $150,000

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[116] For current treatment of debts, see Brett R. Turner, *Division of Debts upon Divorce*, EQUITABLE DISTRIBUTION J., June 2003, at 61 (evaluating the process for division of debts, such as ascertaining whether a legal obligation exists, determining whether the debt is marital or personal (like a gambling debt), deciding whether the debt is a result of dissipation, and considering methods of apportioning or allocating the debt).

of the remaining funds would be designated marital at divorce, and the same $800,000 as before would remain separate.

The system would replace transmutation by use, which, in the states that apply it, essentially punishes separate property holders for sharing their property during marriage.[117] The proposed formula would eliminate this perverse result and the harmful incentive structure it sets up. Similarly, commingled property would not necessarily be deemed marital. Untangling separate and marital property commingled in the course of marriage would require a tracing process similar to that currently employed in many divorce cases. This process can be especially complex when withdrawals are made from an account containing both types of property, and authorities are split as to the correct treatment of such withdrawals.[118] The proposed system would present similar tracing challenges; though complex, they would not be more onerous than the challenges under the current system and would be solvable using the same range of methods currently available. Other valuation issues—for example, the valuation of trusts and family businesses—would also pose difficulties no more complex than those that already riddle valuation of property at divorce.[119] The risk and reward approach would also incorporate existing doctrines dealing with waste or dissipation of marital assets.[120]

Spouses would be permitted to contract out of the system—whether prior to or during marriage. Such opt-out would only be possible by mutual agreement. By contrast, the ALI's and Frantz and Dagan's more liberal opt-out approaches permit one party to unilaterally change the rules of the marriage midstream. However, if there is no premarital agreement, a spouse who wishes to keep separate a gift or inheritance received during marriage, and is unable to obtain the other party's consent, may disclaim the gift. Disclaiming would not override the proposed allocation rule; it would simply revert the property to the donor in the case of a gift or cause it to pass to the next beneficiary under the will. This result would be prefer-

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[117] *See* Oldham, *supra* note 1, at 246 ("[Transmutation by use] punishes generous spouses for allowing the other spouse to use separate property. Spouses who hoard are rewarded.").

[118] For a discussion of the various methods currently used in dealing with withdrawals from commingled accounts, see OLDHAM, *supra* note 15, § 11.03[1]–[2].

[119] *See* Brett R. Turner, *Interests in Trusts as Marital Property*, EQUITABLE DISTRIBUTION J., Sept. 2004, at 97 (describing the different property treatments of revocable trusts, irrevocable trusts, income interests, and remainder interests).

[120] Waste or dissipation of marital assets is a relevant factor in property settlements. *See, e.g.*, FLA. STAT. ANN. § 61.075(1)(i) (West 2007); IND. CODE § 31-15-7-4 (2007); N.Y. DOM. REL. LAW § 236B(1)(d)(11) (McKinney 2008); R.I. GEN. LAWS § 15-5-16.1 (2007); *see also* OLDHAM, *supra* note 15, § 13.02[1][d]. If a spouse is guilty of dissipating the marital estate, those assets are charged against the spouse in an equitable distribution. Stated alternatively, the dissipating spouse will receive a smaller portion of the marital estate to compensate for his or her wasteful activities. *See, e.g.*, Schneider v. Schneider, 864 So. 2d 1193, 1196–97 (Fla. Dist. Ct. App. 2004); Jonsson v. Jonsson, 715 So. 2d 1064, 1064 (Fla. Dist. Ct. App. 1998); Newby v. Newby, 734 N.E.2d 663, 667 (Ind. Ct. App. 2000); Reaney v. Reaney, 505 S.W.2d 338, 340 (Tex. Civ. App. 1974).

able to a rigid application of the proposal where the recipient of a gift wishes to use the funds to take care of other family members such as a disabled parent or sibling. In such a case, a rule requiring that the gift be shared with the recipient's spouse would be inappropriate.

Donor intent, on the other hand, should not override the proposed recharacterization rule. The rule is geared toward making property settlements and divorce fairer, and marriages more harmonious. Donors who condition their gifts by prohibiting recipient spouses from sharing jeopardize these values. Thus, just as current caselaw disregards conditions encouraging divorce as contrary to public policy,[121] conditions limiting spousal sharing of gifts should also be disregarded.[122]

Where divorce proceedings are already underway, none of the gifts or inheritances received would be subject to the proposed rule. The length-of-marriage and holding-period "clocks" would also cease to toll for purposes of calculating the recharacterization percentage on previously acquired property. The precise moment of dissolution would be determined according to the same methods currently in use.[123]

Once the classification stage is complete, marital property would be divided with a presumption in favor of equal division because the central premise of the system is attributing equal freedom and risk to both parties during marriage. Spouses owning assets carrying a sentimental value would have a right of first purchase. Where the value of these assets exceeds fifty percent of the marital pot, an equitable distribution would be determined on a case-by-case basis.[124]

B. *Added Benefits*

Like the partnership theory, the proposed paradigm ensures that homemakers are compensated for their labor. But unlike the partnership theory, this approach does not impose an artificial fiction. Rather than pretending that monetary and nonmonetary contributions have the same value,

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[121] *See In re* Estate of Newalla, 837 P.2d 1373, 1379 (N.M. Ct. App. 1992); Graves v. First Nat'l Bank in Grand Forks, 138 N.W.2d 584, 588–89 (N.D. 1965); Fineman v. Cent. Nat'l Bank of Cleveland, 175 N.E.2d 837, 842 (Ohio Ct. App. 1961).

[122] *See* Frantz & Dagan, *supra* note 10, at 117 ("To be separate, the donor must intend the property for only one of the spouses—gifts and inheritances to both spouses are marital property as a matter of course. While donor intent currently determines the designation of such assets as marital or separate property, it should not be dispositive. After all, most employers intend to pay wages to only one spouse, but this is irrelevant to the classification of wages earned during marriage as marital property.").

[123] *See* OLDHAM, *supra* note 15.

[124] Frantz and Dagan believe that in such cases the entire property should be assigned to the original owner. *See* Frantz & Dagan, *supra* note 10, at 118. In addition to producing unfair results—e.g., where earnings accumulated by the other spouse were used to maintain the property during marriage—this rule creates an incentive on the part of propertied families to give married beneficiaries only or primarily nonliquid property so as to avoid the application of the sharing rule. As already indicated, postdivorce support payments—alimony—and the relevance of fault in the distribution of marital property are outside the scope of this Article.

the proposal matches most people's intuition that husbands' and wives' various contributions to marriage cannot and need not be compared. It also recognizes that spouses often contribute unequally at different points in their relationship as employment and health circumstances change. Indeed, in terms of labor contributed, some marriages are unequal from start to finish. The proposal embodies the notion that matrimony fuses spouses' risks and rewards regardless of their relative contributions of labor.

If adopted, the proposed marital property regime would likely impact attitudes toward separate property during marriage.[125] It would also likely recast the sharing that already occurs within healthy marriages. Many propertied spouses share at least some of their separate wealth with their partner, often more than would be required under the proposed system.[126] But while working spouses share because they are obliged to, beneficiaries of gifted or inherited wealth share as a favor—out of "generosity." This imbalance breeds tension and resentment. By devising an objective formula for how much sharing is fair and logical, the proposal serves an expressive function, relabeling sharing that already occurs as a basic marital duty.

Likewise, the proposal would ensure that spouses' employment decisions are informed by a comparable sense of freedom and risk. Under the current paradigm, the fact that spouses' separate property remains sheltered from the marriage means that spouses with significant differences in premarital and unearned property are likely to have widely divergent exposure to risk and therefore fundamentally different attitudes about work. The proposal turns spouses with disproportionate outside safety nets into members of a team for the duration of the marriage.

Though couples would be permitted to override the proposed formula by private contract, some propertied brides and grooms may find that the new paradigm obviates the need for a "prenup." The reasonable limitations that the proposal places on the amount of separate property subject to divi-

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[125] On the potential effects of divorce law on ongoing marriages, see ALI PRINCIPLES, *supra* note 2, § 4.12 cmt. a, at 772; Frantz & Dagan, *supra* note 10, at 97–98 ("[T]o the extent that law can ever affect social understandings, marital law is at the center of public awareness and debate . . . [and] many parties to ongoing marriages have themselves been divorced, or are at least intimately familiar with the divorce of a close friend or relative. While most spouses may not know all of the legal details, they may be affected by their accumulated impact: the experiences, practices, and social expectations generated by the principles underlying the legal dogma."); Williams, *Do Wives Own Half?*, *supra* note 12, at 269.

[126] *See* ALI PRINCIPLES, *supra* note 2, § 4.12 reporter's notes cmt. a. Financial advisor Bedda D'Angelo also reports that:

> In 37 years . . . I have never met anyone who did not expect to share 100% of everything they owned before marriage with their spouse. . . . Couples that have been married only once for a number of years do not even remember they once owned assets separately and when one of them inherits, they almost immediately re-title assets so that they are jointly owned. Likewise with spousal pension benefits. It is a whole different ball game if even one spouse has been married before. Divorced or widowed, I have never met anyone who did not expect to retain the assets they brought into the marriage in their own name.

E-mail from Bedda D'Angelo, President, Fiduciary Solutions, to author (Aug. 11, 2007, 3:20 EST) (on file with author).

sion at divorce is likely to alleviate some wealthy fiancés' concerns, sparing them and their future spouses the anguish that often surrounds premarital agreement negotiations. For spouses who do wish to write their own contract and for life partners who seek to formalize a commitment other than through civil marriage, the proposed allocation system provides an objective, anxiety-reducing starting point for a sharing plan that is both safe and just. Finally, at the divorce stage, even if legislatures or courts do not adopt the view of marriage as merger of risk and reward, for couples engaged in collaborative negotiations it offers a yardstick that is fairer and clearer than many of the doctrines currently in use.[127]

C. Potential Objections

The proposal raises a number of potential objections. First, the system effectively spreads wealth equally over an owner's life, whereas in fact many people spend different amounts at different stages in life. Some owners view their capital as something they will use only at retirement or in case of an emergency. Others expect to leave most of it to individual beneficiaries or to charity. At the opposite pole, some people's spending patterns would imply that their capital should be frontloaded. A wife who uses most of her premarital assets to purchase a home on day one of the marriage has fundamentally affected the couple's life at the front end.

This objection, however, misconstrues the conceptual framework of shared risk and reward. The idea behind the proposed system is not that property owners are likely to *spend* the full amount attributed to any given year. Rather, allocating the property annually reflects the *power* to spend, save, or give for that slice of time and ensures that the emotional repercussions of this power are shared during the marriage. A husband who reserves every penny of his inheritance for old age still enjoys this money long before he retires. The formula turns a yearly slice of this security into something shared. A wife who uses her inheritance to purchase a home may have *spent* her capital upfront, but the house she purchased is expected to last over time. The formula turns this large front-end contribution into something the husband will share in more and more over time. If the marriage dissolves three years later, the husband will not be entitled to half of the house. Naturally, even the emotional repercussions of the power to spend, save, or gift will vary from year to year. A big career break may diminish one's emotional reliance on a financial safety net. A professional setback or a serious illness may increase this reliance. Allocating risk and reward over life expectancy provides a simple and objective conceptual rubric that will, on average, balance power in marriage more effectively than the current paradigm.

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[127] On the influence of divorce default rules on negotiated settlements, see Singer, *supra* note 12, at 1120.

Second, a parallel objection applies to the inclusion of all marital earnings in the joint marital pot. Especially in professions that generate widely fluctuating income streams, the earnings rule may attribute to marriage income that in terms of a spouse's long-term economic realities should be attributed to the spouse over many years. For example, shortly after her wedding a writer sells for a lump sum a manuscript she had been working on for many years. Should the marriage dissolve shortly thereafter, attributing the entire spike in her income to the marriage seems unfair. This problem is the sort of inevitable side effect that any bright-line rule produces. In practice it could be dealt with through an exception to the formula which would be triggered when a substantial spike in income is apparent.[128]

Third, one might object that because the owner spouse's life expectancy is in the denominator of the formula, a greater proportion of late-to-marry spouses' separate property will be recharacterized at divorce. The logic, again, is that because they have less time to live, the same amount will take them further than it would have in their youth, and this sense of freedom and security should be shared in marriage. Elderly brides and grooms who expect to leave significant amounts in their will would thus be jeopardized by the rule as a larger proportion of their assets would be deemed marital, just as they and their beneficiaries are jeopardized by current elective share statutes. Elective share statutes generally allow the disinherited spouse to claim a significant portion of the testator's estate,[129] and sometimes this estate includes all property titled in the testator's name, including assets that would be deemed separate had the marriage ended in divorce.[130] Seniors who do not expect to spend most of their estate during their own lifetime and who would like to control its passage after death are free to either gift their property before they marry or draft a premarital agreement opting out of the default divorce and elective share rules.

Marriage should have real consequences. It should not be the loose, economically insignificant symbolic marker that the labor-centered rule makes it for couples who meet after their significant income-generating years. Marriage is different from an intimate relationship where the merging of fates is not an essential element. Some couples—old and young—keep all finances separate, some share only household expenses, and others pool assets on an ad hoc basis. The disappearance of the taboo against cohabitation means that unmarried couples can now choose from a range of

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[128] For a discussion of the advantages and disadvantages of income averaging in tax policy literature, see Lily L. Batchelder, *Taxing the Poor: Income Averaging Reconsidered*, 40 HARV. J. ON LEGIS. 395 (2003); Neil H. Buchanan, *The Case Against Income Averaging*, 25 VA. TAX REV. 1151 (2006); Lee Anne Fennell & Kirk J. Stark, *Taxation over Time*, 59 TAX L. REV. 1 (2005); Richard Schmalbeck, *Income Averaging After Twenty Years: A Failed Experiment in Horizontal Equity*, 1984 DUKE L.J. 509.

[129] DOBRIS ET AL., *supra* note 60, at 147.

[130] *See* Rosenbury, *supra* note 1, at 1245–46.

private contracting options to formalize their arrangement.[131] The growing acceptance of premarital agreements today means that married couples can *also* pick and choose among a range of alternatives, creating their own rules for how much, if any, property is shared during marriage and upon dissolution.

In light of this range of choices, if the law continues to use marriage as an eligibility criterion for special treatment, marriage should carry real economic significance. Indeed, income, gift, and estate tax benefits as well as bankruptcy advantages available only to spouses are premised on an assumption that husband and wife form one economic unit. Economically united spouses can be seen as earning the government benefits they receive; their promise to take care of each other in sickness and in health, for richer or for poorer, reduces the likelihood taxpayers will have to pay for one of them falling through the cracks. Thus, the exchange—benefits for commitment—is rational on both ends. Elsewhere I have argued that tax and other benefits should be limited to couples who are in fact legally obligated to share their resources, regardless of their marital status.[132] But seeing that marriage-based eligibility criteria for public benefits are unlikely to change soon, there are compelling arguments to prohibit premarital agreements that erode economic unity in marriage.[133] This is also unlikely, as the trend has been towards broader acceptance of private ordering in marriage. But at the very least, the *default* rules of marriage should reflect the economic unity with which the institution is presumed to be synonymous. Placing the burden on couples who do not wish to merge risk and reward is correct because marriage matters. It matters enough to warrant benefits; these benefits should be linked to real spousal obligations.

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[131] *See* CAL. FAM. CODE § 297 (West 2007); D.C. CODE § 32-702 (2001); HAW. REV. STAT. §§ 572C-1 to -7 (2007); N.J. STAT. ANN. §§ 26:8A-1 to -4 (West 2008); Marvin v. Marvin, 557 P.2d 106 (Cal. 1976); Tapley v. Tapley, 449 A.2d 1218 (N.H. 1982); ALI PRINCIPLES, *supra* note 2, § 6; Cynthia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, 26 LAW & POL'Y 119 (2004); William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV. 961 (surveying domestic partnership laws in the United States); Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381 (2001); Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353; Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435 (2001).

[132] Motro, *supra* note 8; Shari Motro & Peter Smallwood, Letter to the Editor, N.Y. TIMES, June 2, 2007, § A, at 12; Shari Motro, Op-Ed., *The I.R.S.'s Shotgun Marriage*, N.Y. TIMES, Apr. 14, 2006, § A, at 21.

[133] *See* Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 397–98 (2005–06) ("Prenuptial agreements should be held *per se* unenforceable to the extent they purport to limit a spouse's entitlements to alimony or equitable distribution of property in the event of divorce. To allow married persons to cherry-pick the concomitants of their marriage—to avail themselves of the advantages the law confers upon them while evading, by governing instrument, the burdens the law would impose upon them—is inequitable. If they want the perks, they must take the works. If a marriage-bent couple wishes to preserve the low exit costs associated with domestic partnership, then the couple must settle for domestic partnership in its entirety.").

Fourth, using objective actuarial standards to determine the parties' life expectancies could cause distortions where parties are likely to die before or outlive their projected mortality dates. The terminally ill propertied spouse would thus benefit from an overly optimistic life expectancy, which would spread assets more thinly over the years of a failed marriage. The unusually healthy spouse would be harmed because the formula would divide the length of the marriage by a denominator that is smaller than is appropriate. The distortion in favor of the terminally ill would strike most people as tolerable. At the opposite extreme, the unusually healthy who outlive their life expectancy would admittedly suffer under the proposal. But keep in mind that even where the divorce occurs after the expected mortality date of the property owning spouse, no more than fifty percent of marital property would go to the nonpropertied spouse. If the propertied spouse managed to outlive his or her projected life expectancy as of the date of marriage, the marriage is likely to have lasted long enough so that some of these separate assets were shared. Thus, the result under the proposed formula would be no more onerous than current transmutation doctrines.

Fifth, some might argue that by linking recharacterization to length of marriage, the formula encourages divorce. A propertied spouse in a rocky marriage pays a price for every additional year spent trying to make the marriage work. But this is equally true under the current rule when instead of separate property, one spouse earns significantly more than the other. Every additional year of marriage translates into an additional year of earnings being deemed marital. Ultimately, spouses teetering on the edge of divorce often engage in mercenary calculations surrounding spending and accumulating assets so as to maximize their postdivorce positions, and the proposed system would neither curb nor exacerbate these behaviors.

Finally, the implications of the proposal for a non-wage-earning spouse who owns separate property and who performs the brunt of the couple's housework and childcare may initially seem unfair. Such a spouse would be forced to contribute to the marriage "twice"—with labor as well as with property. But this objection is rooted in a contribution-of-labor view of marital equity. In terms of risks and rewards, a stay-at-home spouse whose unearned or premarital wealth remains intact is effectively allowed to hedge her bets. By turning a portion of this outside safety net into a part of the couple's joint decisionmaking calculus, the proposal forces nonearning spouses—often women—to contribute to the marriage comparably in terms of risk. For wives who now leave the workforce relying on separate wealth should their marriage fail, the rule would create an incentive to stay put. In the long-term, it may curb the exodus of elite-educated women from the workforce—the so-called "opt-out revolution."[134] Again, where the non-

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[134] The opt-out revolution refers to the perceived trend of highly educated, professional women who leave the workforce to become stay-at-home mothers. *See* LINDA R. HIRSHMAN, GET TO WORK (2006); Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003, § 6 (Magazine), at 42; Linda R.

wage earner has no premarital assets and receives no gifts or inheritances during the marriage, the formula would have no effect.

The system also protects non- or low-wage earners who rely on their spouse's premarital or unearned resources. Thus, for example, a full-time mother married to a man who spends most of his time managing the charitable foundation he founded with inherited wealth will be entitled to a portion of the money that informed both spouses' decisions during marriage—the wife's decision to care for the couple's children and the husband's decision to forgo gainful employment. Where the primary earner also has substantial separate property, the proposal ensures that both spouses face similar risks, reducing the vulnerability of the nonpropertied spouse who earns little or nothing.

V. CONCLUSION

An extreme example of the poisonous effects of imbalances in husbands' and wives' financial security can be seen in the film *Fargo*. The film is based on the true story of an unsuccessful car salesman who attempts to have his wife kidnapped in order to share in the ransom proceeds that her father—a successful businessman—would pay over. Early in the story we learn that the spouses do not share in life's risks and rewards, a fact that becomes apparent when the husband appeals to his father-in-law to help him invest in a real estate project. If the venture is successful, he explains, it could work out very well for him, his wife Jean, and their son Scotty. The father-in-law dismisses him without so much as glancing in his direction. "*Jean* and *Scotty*," he says, "will never have to worry [about money]." The husband then finalizes the kidnapping plot, with tragic results.[135]

Frantz and Dagan were right: "[L]abor should not be the standard for inclusion in the marital estate—even the fruits of good luck . . . ought to be marital property."[136] This Article takes their observation to its logical conclusion. If marriage turns independent economic beings into a risk-sharing team, the blanket exclusion of unearned and preexisting assets from marital property is indefensible.

Property subject to division at divorce should reflect both spouses' economic identity during marriage—including labor- and luck-generated

Hirshman, *Homeward Bound*, AM. PROSPECT, Dec. 2005, at 20; Claudia Wallis, *The Case for Staying Home*, TIME, Mar. 22, 2004, at 51; Martha Lagace, *Getting Back on Course*, HARV. BUS. SCH. WORKING KNOWLEDGE, Sept. 4, 2001, http://hbswk.hbs.edu/item/2457.html ("Data collected from women in the [HBS] reunion classes of 1981, 1986, and 1991 indicates that only 38 percent of the respondents from the three classes are currently working full time."); Posting of Richard Posner to The Becker-Posner Blog, http://www.becker-posner-blog.com/archives/2005/09/elite_universit.html (Sept. 25, 2005, 21:17 CST) ("[Recent newspaper articles] confirm[]—what everyone associated with such [elite] institutions has long known—that a vastly higher percentage of female than male students will drop out of the work force to take care of their children.").

135 FARGO (MGM 1996).

136 Frantz & Dagan, *supra* note 10, at 117.

property—regardless of source. This proposal spreads separate property over the life of the owner spouse and allocates to the marriage a portion of this property corresponding to the spouse's financial capability during the union. The result yields a fairer and more predictable system than the current partnership-based divorce model. It removes inequities in the treatment of workers and owners, eliminates sharing disincentives, protects propertied spouses from losing significant portions of their estates following short-lived marriages, bolsters the security of dependent spouses, and offers an objective standard for sharing between spouses with disparate resources. Marriage should not mean one thing for workers and another for those who acquire property in other ways. Rather, it should place both spouses in the same boat. The proposal applies a comparable standard to both earners and owners, tying together labor, luck, and love, for the benefit of all.